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THE REAL PROPERTY ACTS,
1874, 1875 & 1876.



U. Brit. Laws, statutes, etc.

THE

REAL PROPERTY ACTS,

1874, 1875 & 1876;

37 & 38 Vict. cc. 33, 37, 57, 78:

*Settled Estates Act, Powers Law Amendment Act, Limitation Act,
and Vendor and Purchaser Act, 1874:*

38 & 39 Vict. c. 87:

Land Transfer Act, 1875:

39 & 40 Vict. cc. 17, 30:

Partition Act and Settled Estates Act, 1876:

With Explanatory Notes:

THIRD EDITION:

BY

WILLIAM THOMAS CHARLEY, D.C.L., M.P.,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW

(LATE EXHIBITIONER OF THE COUNCIL OF LEGAL EDUCATION).

LONDON:

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TO
THE RIGHT HONOURABLE
SIR RICHARD BAGGALLAY,
LATE HER MAJESTY'S ATTORNEY-GENERAL,
AND NOW A JUSTICE OF HER MAJESTY'S COURT OF APPEAL,

This little Work

IS

(WITH PERMISSION)

RESPECTFULLY DEDICATED.

“ We have at last *taken a step* towards removing that complication and expense, which have long been the reproach of THE LAW RELATING TO LAND in this country.” (*Speech of Sir Hugh Cairns, Q.C., M.P., S.G., in the House of Commons, February 11th, 1859.*)

PREFACE

TO THE FIRST EDITION.

MUCH having been said and written about the barrenness of the last Session of Parliament with regard to reforms in the law, it occurred to the writer that the publication of the measures relating to Real Property, which received the Royal Assent in the course of the Session, might furnish some answer to these statements. It seemed desirable to accompany the new statutes with such explanatory notes as might tend to elucidate their meaning and set forth their objects. The unpretending little volume now presented to the public and to the profession is the result. The notes have no claim to originality; the writer has, with rare exceptions, preferred to state propositions of law in the language of well-known jurists or of judicial authority, rather than in his own.

The custom of making text-books mere digests of decided cases, is a growing one at the present day. It ensures accuracy, but it renders the text-books almost unreadable. Two new features have been introduced into the present work, with a view to rendering it more readable; a short historical review is given of the progress of each of the new Acts through Parliament; and reference is made occasionally to the independent criticisms of the legal press upon these enactments. Of course the criticisms of the editors and correspondents of legal periodicals possess no shadow of legal authority: but they furnish the best, and, indeed, the only possible means of supplying the want occasioned by the total and, for the present, at least, unavoidable absence of legal decisions on the construction of the new Acts. It is the province of the legal press to suggest difficulties; and the writer, in an humble way, has tried to solve them.

W. T. C.

5, CROWN OFFICE ROW, TEMPLE,
November 7th, 1874.

PREFACE

TO THE SECOND EDITION.

THE First Edition of this little work having, through the favour of the public and of the profession, had a rapid sale, it has become necessary to issue a Second Edition.

In preparing this Edition for the press the writer has freely availed himself of the suggestions offered to him by his critics—whether reviewers or correspondents—for the improvement of the work. “The False Personation Act, 1874,” has been omitted; though affecting the ownership of real property, it is, strictly speaking, an amendment of the criminal law. Some of the notes to “The Vendor and Purchaser Act, 1874,” have been re-written. The cases upon the other “Real Property Acts, 1874,” decided since the First Edition was issued, have been carefully noted. The extracts from the legal periodicals, which formed a somewhat prominent

feature in the First Edition, have been expunged or relegated to foot notes (*a*).

A Land Transfer Bill was introduced by the Lord Chancellor in 1874. If it had passed into law, it would naturally have taken its place in the First Edition of this work among "The Real Property Acts, 1874." It was, however, withdrawn at the close of the Session of 1874.

At the earliest possible moment last Session it was re-introduced, in a greatly improved form, and passed smoothly, and with quiet approbation, into law (*b*).

The new enactment amends "The Vendor and Purchaser Act, 1874;" but, apart from this, in a Second Edition of the present work it finds, the writer submits, an appropriate place (*c*).

W. T. C.

5, CROWN OFFICE ROW, TEMPLE,
September 1st, 1875.

(*a*) The writer has acted, in this respect, upon the suggestion of his former tutor in Conveyancing, Mr. E. P. Wolstenholme, Editor of "Jarman on Wills," and one of the Land Transfer Commissioners.

(*b*) The only questions on which any controversy arose were—(1) Whether registration should, after a specified interval, be compulsory? (2) Who shall be "the real representative?" (3) The policy of enabling the registered owner to mortgage by deposit the land certificate; and (4) The policy of disabling the registered owner from removing the land from the register.

(*c*) A copious Index to the new act will be found, p. 379.

PREFACE

TO THE THIRD EDITION.



THE Second Edition being out of print, it has become necessary to prepare a Third Edition of this work.

The most recent cases on "The Real Property Acts, 1874," have been noted up in this Edition. The Rules, Orders and Forms issued by the Lord Chancellor (*a*) under "The Land Transfer Act, 1875," have been set out, in the shape in which they originally appeared, in an "Appendix" to that Act. The Rules and Orders have also (for convenience of reference) been cited *in extenso*, under the sections to which they are ancillary. The writer has to tender his thanks to the learned Assistant-Registrar, Mr. Robert Hallett Holt, for kindly revising the proof-sheets of the

(*a*) The "General Rules" were framed "with the advice and assistance" of the Registrar, Mr. Brent Spencer Follett, Q.C.

notes to the Land Transfer Act, and for placing at his disposal some useful explanatory memoranda in MS.

The Real Property Acts of last Session comprise "The Partition Act, 1876," and "The Settled Estates Act, 1876." Mr. Marten, Q.C., who, jointly with Sir Henry Jackson, Q.C., introduced the former, and who, also, carried the latter, enactment, has kindly signified his approval of the annotations appended to the two enactments, and has also furnished a useful note explanatory of an obscure passage in "The Partition Act, 1868." The importance to the public of "The Settled Estates Act, 1876," may be gathered from the statement made by the *Solicitors' Journal* (b), that "upwards of a million of money has been waiting to be laid out" under the powers which it confers.

W. T. C.

5, CROWN OFFICE ROW, TEMPLE,
August 30th, 1876.

(b) Vol. XX., No. 40, p. 779 (August 5th, 1876).

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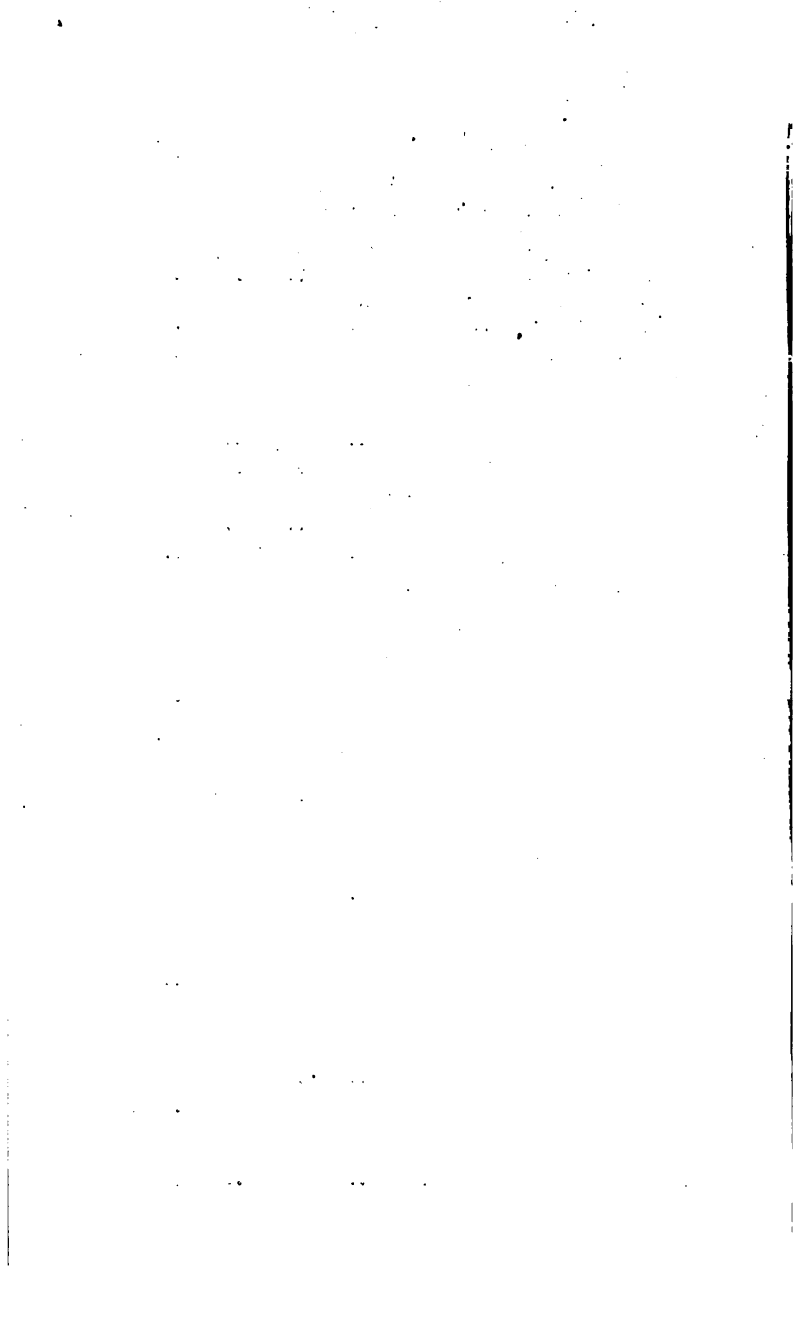


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THE
REAL PROPERTY ACTS, 1874.

I. LEASES AND SALES OF SETTLED
ESTATES.

37 & 38 VICT. C. 33.

AN ACT TO EXTEND THE POWERS OF THE LEASES
AND SALES OF SETTLED ESTATES ACT.

AS originally drawn by the honourable member for East Sussex (Mr. G. Gregory), and as it passed the House of Commons, the bill on which this act is founded contained only a single clause, besides the "short title," and was as follows:—"The Court of Chancery may, in any application made under the principal act, and for the purposes thereof, if it shall so think fit, dispense with the concurrence or consent of such persons, or of any such persons, as are required to concur in or consent to any application for the exercise of the powers of that act; but notice of such application shall be given to such persons, and such other notices shall be given and proceedings had, and such applications shall be otherwise dealt with in such manner, and such order may be had thereon, as are prescribed by the said act, or any orders made in pursuance thereof, with regard to the exercise of the powers conferred by that act."

The bill went up to the House of Lords, and the Lord Chancellor (Lord Cairns) objected to it in this form as "too sweeping in its terms." He suggested that a clause should be introduced to require the court not only to serve notice upon everyone interested, but also to require of each of them a statement as to

whether he assented or dissented; or whether he submitted his rights to the court. A clause might also be introduced providing that the court, in considering whether it should act, should have regard to the number of assents and dissents, respectively, and to the amount of the interests of those persons who did not consent. (A noble peer had, just before, moved the rejection of the bill, on the ground that it involved an attack on "the sanctity of settlements!") Lord Chelmsford, who had charge of the bill in the House of Lords, promised to introduce the amendments which the Lord Chancellor suggested (*a*).

It will be perceived that the bill was entirely recast in accordance with the Lord Chancellor's suggestions; and the form in which it now stands upon the statute-book is certainly a great improvement on the form in which it was originally introduced into the House of Commons; but, even in its original form, the bill was, as Mr. Lopes, whose name was on the back of it, justly observed, "a valuable contribution to the legislation of the session" (*b*).

Preamble.

Whereas it is expedient to extend the operation of the Act, chapter one hundred and twenty of the nineteenth and twentieth years of her Majesty, to facilitate Leases and Sales of Settled Estates, hereinafter called "the principal act."

The "expediency" of "extending the operation" of the Leases and Sales of Settled Estates Act was vindicated in the following terms by the Lord Chancellor (Lord Cairns), when resisting the motion of the Marquis of Bath for the rejection of the present measure:—

"The Act of 1856 simply conferred on the Court of Chancery jurisdiction to introduce a power, which ought to be contained in every well-drawn settlement, namely, the power of sale and

(*a*) Hansard's Parliamentary Debates, Third Series, vol. ccxx. p. 856 *et seq.* (2nd July, 1874). The bill, in its amended form, was draughted by Mr. George Jenkins, the Assistant Conveyancing Counsel to the Government.

(*b*) *Ibid.* vol. ccxix. p. 545 (20th May, 1874).

exchange and granting leases. So far, therefore, there was no invasion of the sanctity of settlement. But what has happened under the provisions of the act, which requires the assent of all parties? Why, everyone having any interest under the settlement, whether that interest is large or small, distant or proximate, certain or doubtful, has a right to step in and prevent the action of the court. Accordingly, persons whose interests are minute and fragmentary, and to whom no injury can by possibility be done by the lease or sale, being armed with the power given them by that act, use it for the purpose of preventing the action of the court, where it would have been beneficial,—their object being to make bargains and extort money. I do not think," said his lordship, "that the working of a useful act of parliament should be impeded in this way, and therefore I regard the object of this bill as a beneficial one" (c).

The observations of Vice-Chancellor Malins in *Re Merry's Settled Estates* (d), decided in 1867, are so much to the point, in justifying the preamble, that it may not be out of place to transcribe them here. In that case the lands stood settled, under a will, upon Mrs. Bird, the testator's daughter, for life, with remainder to Mr. Bird, her husband, for life, with remainder to their children in fee: and there was a limitation over, in default of children living at the death of the surviving tenant for life, in favour of the brothers and sisters of Mrs. Bird living at the death of the surviving tenant for life: and there was no residuary devise. The surviving sisters of Mrs. Bird and the representatives of the testator's heir-at-law obtained leave, under the 20th section of the Act of 1856, to appear and oppose the petition of Mr. and Mrs. Bird, who asked power to lease the property for twenty-one years, evidence having been given that a favourable offer had been made at an increased rent. Vice-Chancellor Malins said: "I have no doubt, upon this evidence, that the granting of this lease would be *extremely beneficial* to all parties interested in the estate. But the parties who oppose this petition are perfectly entitled to exercise their judgment in the matter. I feel con-

(c) Hansard's Parliamentary Debates, Third Series, vol. ccxx. p. 856 (2nd July, 1874).

(d) 15 W. R., 307; W. N. (1867), 32.

strained by the language of the 17th section to decide that no order can be made by the court without their consent and concurrence, or in the face of the opposition of any person beneficially interested in the estate. I cannot grant the prayer of this petition, and I say this with great reluctance. It must therefore be *dismissed with costs*. It is much to be regretted that the court has not a discretion vested in it in such cases, and it would be well if the terms of the act underwent some revision and modification in this respect."

The great improvement introduced by the Act of 1856 may be gathered from the fact, referred to both by Mr. Gregory (*e*) and Lord Chelmsford (*f*), and incidentally alluded to in that act itself (*g*), that prior to its passing, persons entitled to the possession of settled estates were obliged to come to parliament for a private act before they could lease or sell them.

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows, that—

As no date is fixed for the commencement of this act in the body of the act, it came in force on the 16th July, 1874, the day on which it received the Royal Assent (*h*).

SECTION 1.

Short Title.

This act may be cited as the Leases and Sales of Settled Estates Amendment Act, 1874.

There is, unfortunately, no "short title" to the Leases and Sales of Settled Estates Act, by which it is known to the law. There have been previous amending acts, 21 & 22 Vict. c. 77, and 27 & 28 Vict. c. 45.

(*e*) Hansard's Parliamentary Debates, Third Series, vol. ccix. p. 542.

(*f*) *Ibid.* vol. ccxx. p. 855.

(*g*) See section 21. See also per Sir G. M. Giffard, -L. J., in *Beisley v. Carter*, 4 L. R. (Ch.), 230, 240.

(*h*) 33 Geo. 3, c. 13. *Nares v. Rowles*, 14 East, 510.

SECTION 2.

Notice to be given to Persons who do not consent to or concur in Application.

Where under the principal act the concurrence or consent of any person in or to any application hereafter to be made under that act is required, and such concurrence or consent shall not have been obtained, notice shall be given to such person, in such manner as the court to which such application shall be made shall direct, requiring him to notify, within a time to be specified in such notice, whether he assents to or dissents from such application or submits his rights or interests, so far as they may be affected by such application, to be dealt with by the court; and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the court.

The "principal act" (19 & 20 Vict. c. 120), s. 17, provides, respecting "concurrence and consent," as follows:—"Subject to the exception contained in the next section, every application to the court shall be made with the concurrence or consent of the following parties: namely—Where there is a tenant in tail under the settlement in existence, and of full age, then the parties to concur or consent shall be such tenant in tail, or if there is more than one such tenant in tail, then the first of such tenants in tail, and *all persons in existence having any beneficial estate or interest* under or by virtue of the settlement prior to the estate of such tenant in tail, *and all trustees having any estate or interest on behalf of any unborn child* prior to the estate of such tenant in tail. And in every other case the parties to

concur shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and, also, all trustees having any estate or interest on behalf of any unborn child."

The "exception" referred to in the 17th section is contained in sect. 18: "Provided, nevertheless, that unless there shall be a person entitled to an estate of inheritance, whose consent or concurrence shall have been refused or cannot be obtained, it shall be lawful for the court, if it shall think fit, to give effect to any petition *subject to and so as not to affect* the rights, estate, or interest of any person whose consent or concurrence has been refused or cannot be obtained, or whose rights, estate, or interest ought, in the opinion of the court, to be excepted."

As to "notice," the 19th section provides:—"Notice of any application to the court under this act shall be served on all trustees, who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who, in the opinion of the court, ought to be so served, unless the court shall think fit to dispense with such notice." Sect. 20 enacts, that "notice of any application under the act shall" also "be inserted in such newspaper as the court shall direct." Commenting upon this enactment, Mr. Gregory said:—"The practice of parliament formerly was to require the consent of all parties interested under the settlement, and in handing its powers over to the Court of Chancery, parliament required it to obtain such consents. It did not, however, occur to parliament that the court has not, like parliament, the inherent power of dispensing with such consent by legislation—a power which has been exercised against persons who proved unreasonably obstructive." It will be perceived that, by the principal act, notice must be served on trustees for unborn persons, and also "on any other parties who, in the opinion of the court, ought to be so served." The 2nd section assumes, it is submitted, that the notice required by the principal act has been previously given, and that the person on whom it has been served has refused to concur or consent, and enacts, that *then a second* notice shall be given him requiring him to notify, within a time to be specified in such notice, whether he assents to or dissents from the application or submits

his rights or interests, so far as they may be affected by it, to be dealt with by the court. If no such notification is given by the person objecting to the lease or sale, he is to be deemed to have submitted his rights and interests to be dealt with by the court.

The words of the 17th section, "all persons in existence," do not include an unascertained person having a contingent interest under the settlement, *e. g.*, the heir of the tenant for life, to whom the estate is limited in default of appointment, on the principle that "*nemo est hæres viventis*" (i).

In *Re Crabtree's Settled Estates* (k), a petition was presented under the principal act, praying that a lease of certain estates, settled by the will of J. Crabtree, might be carried into effect. Two persons of unsound mind, but not so found by inquisition, were made respondents. They were both confined to lunatic asylums. The petitioners took out a summons under the 2nd section of this act, in order that directions might be given to serve notice under that section upon the respondents, by serving it on the managers of the asylums, or in such other way as the court might direct. Vice-Chancellor Bacon doubted whether the case of persons of unsound mind came within the 2nd section of this act; and, at his request, the application was renewed to the Lords Justices. After hearing counsel for the petitioners, the Lords Justices decided that service on the persons of unsound mind would be good under the section; but directed that it should be *made personally* on them, as well as on the managers of the asylums.

In *Re Slark's Settled Estates* (l), a petition was presented to obtain the sanction of the court to certain proposed leases of a settled estate. The concurrence of all parties interested had been obtained, with the exception of one, who, by reason of ex-

(i) *Beioley v. Carter*, 4 L. R. (Ch.), 230 (1869). The limitation in default was "in trust for the person whom she shall leave her heir." The Lords Justices reversed the decision of Lord Romilly, M. R. See, also, *In re Strutt's Trusts*, V.-C. M., 43 L. J., 69. The heir was allowed to oppose in *Re Merry, ubi supra*; but the distinction between *Beioley v. Carter* and *Re Merry's Case* is, that in the latter the heir had been ascertained and was in existence, in the former the heir was unascertained.

(k) 44 L. J. (Ch.), 261; 10 L. R. (Ch.), 201.

(l) *Weekly Notes*, Dec. 4th, 1875.

treme old age, was unable to concur in writing, as required by s. 17 of the principal act. On an application to him by counsel for the petitioner, for direction as to how notice of the application should be served on the party who had not concurred, under s. 2 of this act, Sir George Jessel, Master of the Rolls, directed the petition to be served on the party *personally*.

The case of *Re Chamberlain(m)*, decided in July, 1875, was as follows:—Joseph Chamberlain, by his will dated the 11th of July, 1872, gave, devised, and bequeathed to two trustees all his real and personal estate and property of every description, in trust to pay debts, and funeral and testamentary expenses, and as to all the residue he directed his said trustees to sell and convert the same (if it should seem fit to them to do so) as early as conveniently might be, the receipt of such trustees alone to be a sufficient discharge for any moneys received, and directed his said trustees to invest the proceeds, and to pay the income to his wife, Frances Chamberlain, during life or widowhood, for the joint uses and maintenance of herself and his son, Francis Joseph Chamberlain, the wife's receipt alone to be a good discharge to the trustees, and the son to have no power over the estate during his mother's lifetime, but if she should die or marry again before the said son attained twenty-one, then to pay the income to him, till he attained that age, making advances for maintenance and education at their discretion. After other directions, not material to be here set out, the testator directed that if his said wife remained a widow and outlived his said son, then at her decease the whole of his estate should be divided into two moieties or equal portions, one of which should be divided equally, share and share alike, between his brothers and sisters who should be living at the time of her decease, and if none of his brothers or sisters should be then living, such of the children of his brothers and sisters as should then be alive should divide the same moiety among them, share and share alike; the other moiety to be subject to his said wife's will, and in default of any such will to go to her next of kin. A petition was presented by the widow, the infant by special guardian, and the trustees of the will, to obtain the sanction of the court to a contract for a lease of part of the land.

There were two brothers and two sisters of the testator living, all of whom were *sui juris* and had infant children.

Counsel for the petitioners argued that under the present act, service on the brothers and sisters of the testator, as well as on their respective infant children, might be dispensed with. Sir C. Hall, V.-C., said that he considered that the estate was a "settled estate" within the meaning of the principal act; that the power of dispensing with service given to the court under the present act was discretionary; that he would dispense with service on the infant children of the brothers and sisters, but that the petition must stand over until the next petition day in order that the brothers and sisters of the testator might be served. The petition accordingly stood over; and on the following petition day, upon affidavits of service upon the testator's brothers and sisters being produced, the order was made as prayed.

SECTION 3.

Court may dispense with Consent, having regard to the Number and the Interests of Parties.

An order under the principal act may be made upon any such application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained, or shall have been refused, but the court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom, or who submit or are to be deemed to submit their rights or interests to be dealt with by the court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made, and every order of the court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

This section affords an additional security to the party object-

ing, the court being expressly required to "have regard to the *quantum* of his estate or interest" ("the amount" of the interest is the expression used by the Lord Chancellor). It will be seen, however, that the *repetition* of the dissent will not affect the validity of the order of the court.

The concluding words of this section, "And every order of the court made upon such application shall have the same effect as if all such persons had been consenting parties thereto;" if they do not exactly repeal the 18th section of the principal act (*n*), at all events enable the judges to decide the case, unfettered by the restrictive words of that section, "subject to and so as not to affect the rights, estate or interest of any person, whose consent or concurrence has been refused or cannot be obtained."

In the recent case of *Re Lewis's Settled Estates*, Sir C. Hall, V.-C., held, that under the present enactment it was unnecessary to make a child, who was entitled to an estate in remainder, and was born after the presentation of the petition, but before the hearing, a party to the petition, and he directed that the order on the petition should contain a statement that the court did not require the new-born child to be made a party (*o*).

In the recent case of *Re Hooke's Estate*, the testator's estate was settled to the following uses:—To the eldest son, J. J. B. Hooke, for life, with remainder to his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail, with remainder to the testator's second son, John Hooke, for life, with remainder to his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail. J. J. B. Hooke had two daughters, and no son. The two daughters were infants. The petition was presented by J. J. B. Hooke, and his two infant daughters by their guardian. The remaindermen had not been

(*n*) "These words seem by implication to repeal the 18th section." *Law Times*, vol. lvii., No. 1646. In the opinion, however, of the author of the new act (kindly communicated by him to the writer), "sect. 18 of the principal act is not in any degree repealed."

(*o*) *Notes of Cases*, 153 (Nov. 13th, 1873); *Weekly Notes*, 1875, 190.

served with notice under the 2nd section of the present act, and a question was raised whether such service was necessary to enable the court to proceed under this section. Sir R. Malins, V.-C., considered that, although the remaindermen had not been served, an order could be made under this section, as it was not compulsory under sect. 2 to serve the remaindermen (*p*).

The principles on which this section ought to be applied (or, rather, *not* applied) by the Chancery Division of the High Court of Justice have been thus enunciated by the Master of the Rolls:—

“It does not appear to me that the meaning of the new statute was, that the court should decide simply according to its own notion of what would be best to be done with the property. It does appear, so far as I can form an opinion at present as to the grounds on which such a jurisdiction should be exercised, that it was only in cases of comparatively *unimportant persons*—that is to say, *unimportant as regards value or interest in the estate—dissenting*, that the court ought to exercise such a power as this, and I should require much further argument to convince me that where the persons were equal in number, and where the values of the interest approach so closely, the court, having regard to the number and value of interest of those who dissented, ought to exercise the discretion given to it by the 3rd section of the act. My present opinion is that it ought not” (*q*).

In that case Mrs. Taylor, the tenant for life, beneficially, was sixty-one. If she survived Mr. Keily, aged forty-three, she would become entitled, beneficially, to the whole; if she died in his lifetime, he would become entitled to the whole. He dissented, and she petitioned. Sir George Jessel, M. R., refused to dispense with Mr. Keily's concurrence.

SECTION 4.

Applications to be dealt with otherwise as prescribed by principal Act.

All such applications shall be otherwise dealt with in such manner as are prescribed by the

(*p*) *Weekly Notes*, 1875, 29.

(*q*) *Taylor v. Taylor*, *Taylor v. Keily*, *Ex parte Taylor*, L. R., 1 Ch. Div., 426, 433.

principal act, or any orders made in pursuance thereof, with regard to the exercise of the powers conferred by that act.

The 41st of the Consolidated General Orders of the Court of Chancery contains (*q*) instructions respecting proceedings under the Act of 1856. And see Regulation of 8th Aug. 1857, Rules 21—23.

There is no section defining the extent of the present enactment or incorporating it with the principal act; but the 45th section of the principal act confines the operation of that act to England and Ireland (*r*), and the courts would read the two acts together, even without any special clause requiring them to do so. Thus, sect. 26 of the principal act would be held to restrict or enlarge, as the case may be, the operation of this act as well as that of the principal one (*s*).

Every point in practice under the Act of 1856 will be found fully discussed in Daniell's Chancery Practice, c. xlv. s. 5 (*t*).

(*q*) Order XI, iii., 14—25.

(*r*) See also sect. 2, which confines the act to "estates in England and Ireland."

(*s*) See *Law Times*, vol. lvii., No. 1645 (17th Oct. 1874). This is the opinion, also, of the author of the new act.

(*t*) Pages 1832—1856, 5th ed. See also Shelford's Real Property Statutes, pp. 686—708, 8th ed. (1874); Pemberton's Judgments and Orders, c. xxxix. (1876), and the following recent cases on the 17th section: *Grey v. Jenkins*, 26 Beav., 351; *Re Potts*, 15 W. R., 29; *Re Boughton*, 12 W. R., 34; *Re Marquis of Cholmondeley*, W. N., 1866, p. 388; Ir. Rep., 8 Eq., 76; on the 18th section, *Re Parry*, 34 Beav., 462; and on the 20th section, *Re Hemsley*, 43 L. J. (Ch.), 72. See also *In re Strutt*, 43 L. J. (Ch.), 69; *In re Memburn*, 22 W. R., 752; *In re Russell*, 22 W. R., 399; *In re Newman*, 9 L. R. (Ch.), 681; *In re Horn*, 29 L. J., N. S., 830; *In re the Duchess of Cleveland*, 22 W. R., 818; *Howard v. The Earl of Shrewsbury*, 17 L. R. (Eq.), 378. See also, in the *Weekly Notes* for 1875, notes of the following short cases: *In re Gray's Settled Estates* (106); *In re Burnley's Settled Estates* (78); *In re Warne's Settled Estates* (109); *In re Wood's Settled Estates* (126); *Scott v. Heisch* (211); *Broadwood's Settled Estates* (224); in the *Weekly Notes* for 1876, *In re Venour's Settled Estates* (139); and *In re Sheffield's Settled Estates* (152).

II. POWERS LAW AMENDMENT.

37 & 38 VICT. C. 37.

AN ACT TO ALTER AND AMEND THE LAW AS TO APPOINTMENTS UNDER POWERS NOT EXCLUSIVE.

THE bill on which this act is founded was presented by Lord Selborne, and, having received the approval of the Lord Chancellor, it passed rapidly through both houses of parliament without any alteration or opposition. The Attorney-General (Sir Richard Bagge) (u) took charge of it in the House of Commons. No discussion arose upon it in that House.

The debate on the second reading in the House of Lords will be found in Hansard, vol. ccxx. (x), and as it is short, and historically interesting, it is here transcribed. "The order of the day for the second reading of the Powers Law Amendment Bill having been read, Lord Selborne, in moving that the bill be now read a second time, said, that 'as the law relating to powers stood formerly, the person with power to appoint a fund among a certain number of persons was bound to appoint a substantial share to each. If he did not, his execution of the power might be set aside as illusory. In 1830, Lord St. Leonards induced parliament to pass an act providing that no execution of power should be set aside as illusory if anything whatever had been appointed, unless it clearly appeared on the face of the power that the donor intended that a substantial share to each person should be appointed. Since the passing of that act, it had been held to be sufficient, in order to prevent the execution of such power from being set aside as illusory, to appoint a shilling, or some other nominal sum, to each of the objects; but if any of them were totally left out, the execution of the power might still be set aside. Vice-Chancellor Hall had called his attention to

(u) Now a Justice of Appeal.

(x) Third Series, pp. 68, 69 (June 18th, 1874).

the necessity of further legislation in the matter; and the object of this bill was to provide that no appointment, which should hereafter be made in exercise of any power, should be invalid on the ground that any object of such power had been altogether excluded: but every such appointment should be valid and effectual, notwithstanding that any one or more of the objects should not thereby, or in default of appointment, take a share or shares of the property subject to such power.'

"The Lord Chancellor (Lord Cairns) said, that 'the bill was a curious illustration of the way in which legislation advanced in this country. Formerly the law held that no power had been duly exercised, unless every object of the power had a share in the appointment, but did not require that the share given should be a substantial one. The exercise of many powers had been declared invalid, on the ground that though no person had been absolutely excluded, the share appointed had been merely illusory. Lord St. Leonards' Act made the appointment legal if the share apportioned was only one shilling. The present bill would render it unnecessary any longer to "cut a man off with a shilling" (y). *The provision of Lord St. Leonards' Act was itself illusory*; and, as this legislation was a step in advance, he should not oppose the second reading.' Motion agreed to; bill read a second time accordingly, and committed to a committee of the whole house on Monday next."

Lord Selborne, in framing his amending measure, paid a graceful compliment to the skill of the author of "A Practical Treatise of Powers," by following, as far as he possibly could, the drafting,—nay, the *ipsissima verba*,—of the act to alter and amend the law relating to illusory appointments:—11 Geo. 4 & 1 Will. 4, c. 46.

"Whereas, by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property: And whereas appointments in exercise of such powers, whereby an unsubstantial, illusory, or nominal share of the pro-

(y) The gift of a shilling was good *at law* before Lord St. Leonards' Act. 1 Term Rep., 438 (n.).

perty affected thereby is appointed to or left unappointed to devolve upon any one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding at law: And whereas considerable inconvenience hath arisen from the rule of equity relative to such appointments, and it is expedient that such appointments should be as valid in equity as at law; be it therefore enacted":—

Sect. 1. "That no appointment, which from and after the passing of this act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power.

Sect. 2. "Provided always, and be it further enacted, that nothing in this act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded.

Sect. 3. "Provided also, and be it further enacted and declared, that nothing in this act contained shall be construed, deemed, or taken, at law or in equity, to give any other validity, force, or effect to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power."

The "object" of this measure was, "to put the equitable rule on the same footing as the rule at law, so that there should be no such things as illusory appointments known in our courts after the passing of this act" (z), and the act has been entirely successful in achieving this object.

(z) Hansard's Parliamentary Debates (New Series), vol. xxii., p. 364.

Lord St. Leonards has satirized, in his "Treatise of Powers," the extraordinary results at which the equity judges arrived, in exercising the—to modern equity judges, at least—highly distasteful and thankless office of discriminating between illusory and substantial shares (*a*):—

"The result of the authorities, then, was rather a negative than an affirmative rule. Lord Alvanley determined that where a party is, in default of appointment, to take a third share, a gift of a hundred and ninetieth share to him is illusory (*b*); and here the Master of the Rolls (*c*) drew the line: so that any share which, squared by this rule, would exceed that in amount, was not deemed illusory. But upon an appeal to the Lord Chancellor (*d*), in *Baw v. Whitbread* (*e*), for the express purpose of restoring the old rule, his lordship thought that the principle stated in the late cases in effect destroyed all the authorities."

Preamble.

Whereas by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects in such manner that no one of the objects of the power can be excluded, or some one or more of the objects of the power cannot be excluded by the donee of the power from a share of such property, but without requiring a substantial share of such property to be given to each object of the power, or to each object of the power who cannot be excluded:

And whereas instruments *intended* to operate as executions of such powers are frequently in-

(*a*) Sugden on Powers, 8th ed., pp. 938—942. The recent cases will be found collected in 1 White & Tudor's L. C. in Eq., 401—405, under *Aleyn v. Belchier*, 4th ed. (1872).

(*b*) In *Kemp v. Kemp*, 5 Ves., 849.

(*c*) Sir W. Grant, in *Butcher v. Butcher*, 9 Ves., 382.

(*d*) Lord Eldon.

(*e*) 16 Ves., 15.

valid in consequence of the donee of the power appointing in favour of some one or more of the objects of the power to the exclusion of the other or others, or some other or others of such objects, and it is expedient to amend the law so as to prevent such *intended* appointments failing :

The opening words of the preamble are copied from the preamble of Lord St. Leonards' Act :—"Whereas by deeds, wills and other instruments, powers are frequently given to appoint real and personal property among several objects in such manner that none (*f*) of the objects of the power can be excluded by the donee of the power from a share of such property."

Lord St. Leonards' Act put an end to the "equitable" doctrine of illusory appointments, but it left open the mischief mentioned in the preamble of the new act, that executions of powers INTENDED to be good, turn out to be bad, on account of no appointment at all having been made to some one or more persons technically and constructively regarded by the judges as an "object" or "objects" of the power.

Lord St. Leonards, when he was carrying the "Illusory Appointments" Bill through the Lower House, as Solicitor-General of the Duke of Wellington's administration, was confronted by Mr. Daniel O'Connell with a proposition that the legislature should fix the proportion which should constitute the minimum to be appointed to each object by analogy to the French *légitime* ; but it was negatived without a division. When the bill was introduced, O'Connell rose and said, "I conceive that a slight mistake has been made in the bill, which will require amendment. . . . I would suggest that it might be as well to take away the absolute power of appointment, and make it imperative to give each of the children an equal share. This plan may, to some persons, appear mischievous, but it has

(*f*) As "*none*" may be plural, it is properly altered in the new act to "*no one*." "Or some one or more of the objects of the power cannot be excluded," is added in the new act, thus indicating more precisely the different kinds of exclusive powers of appointment.

been tried and succeeded well in France' (*g*). In committee on the bill, O'Connell proposed an amendment, which, he said, "would prevent any person having the power to make an appointment [from making it], unless he gave to every child a *substantial* share." But then the intention of the great agitator at once appeared to be to restrain, not the donee of the power merely, but the donor. "My object," he said, "is to make it obligatory on the father to provide for each of his children" (*h*). The amendment was put and negatived without a division. O'Connell immediately rose again, and "proposed another clause as an amendment, leaving half his property at the free disposal of a parent, and compelling him to divide the other half in aliquot parts among all his children." This amendment, after a "few words from the Solicitor-General," was also "negatived without a division," and the bill passed through committee (*i*).

The fact is, that any attempt to fetter the discretion of the donee of the power, where the donor has not, except constructively, fettered it, is, as Sir Edward Sugden pointed out and O'Connell candidly admitted, to take away the power of free disposition from the donor, and being alien to the genius of the law of England, which, as Sir Edward Sugden said, is "favourable to every latitude in the disposition of property," is very unlikely to receive the sanction of the British legislature.

The highest authority on the subject of Powers traced their introduction to this "liberal principle" (*h*) that "every latitude" should be afforded in the disposition of property. Powers admit of great elasticity. Discretion in their exercise is of the very essence of them. What would this discretion be worth, if it were "cribbed, cabined and confined," cut down by the legislature to the "uttermost farthing"—looking only, as Lord Eldon said (*l*), "to sums and figures?" The donor selects the donee of the power for the very reason that he (or she) is a person in

(*g*) Hansard's Parliamentary Debates (New Series), vol. xxii., pp. 365, 367 (Feb. 11th, 1830).

(*h*) Hansard, *ubi supra*, p. 920 (Feb. 24th, 1830).

(*i*) *Ibid.*, p. 923.

(*k*) *Ibid.*, p. 363.

(*l*) *Bax v. Whitbread*, 16 Ves., 15, 19.

whom he can repose confidence to do what he himself would do, if alive at the time of the exercise of it. Is the legislature to say to the donor, "We forbid you to repose this confidence? You have confidence in the donee, but we have not. We insist on fettering him, although, in fettering him, we know that we are acting contrary to your wishes." The legislature might just as well put an end to powers of appointment altogether. If a stereotyped sum must be, of necessity, given in every case, powers of appointment are useless things. The very object of them is to enable the donee to control the equality of distribution which would follow in default of appointment, so that the "children" or "grandchildren," as the case may be, of the donor shall be upon their good behaviour when he is no more. The donee of the power stands, practically, *in loco parentis* towards the class indicated in the creation of the power. It is an error to suppose that, except in certain exceptional cases (*m*) (*e. g.*, where there is no limitation in default of appointment), the donee of the power is a trustee, or in the nature of a trustee. "Powers," says Lord Chief Justice Wilmot (*n*), "are never imperative, they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." But it may be said, if the donor wishes that the donee of the power should have authority to exclude any of the objects of the power altogether, he can give him an *exclusive* power of appointment. Is it not wrong to enable the donee of the power to "defraud of his rightful expectations an object of the power, whom the donor may have mentioned by name as an especial object of his bounty?" At all events it is better that the thing should be done "straightforwardly" than "in an underhand manner."

But the question whether a power is exclusive or not, is often one of great nicety. It has been held, for example, that where the words of the power were not exclusive, the donor having used the expression, "to give my children and grandchildren,"

(*m*) See, on this subject, 2 White & Tudor's L. C. in Eq., 946—973, under *Harding v. Glyn*.

(*n*) Opinions and judgments of Sir J. Eardley-Wilmot, P. C., C. J., C. P., p. 23.

or "to give my children," the addition of such explanatory words as "according to their demerits," "as she" (the donee of the power) "shall think proper and they best deserve," transformed what, without these words, was a non-exclusive power, into an exclusive one (*o*). Yet are not such explanatory words, implied in every power of appointment? The most refined distinctions have arisen upon the little monosyllable "such," in discriminating between exclusive and non-exclusive powers (*p*). The conjunctive and disjunctive conjunctions have exercised the consciences of the judges not a little, and they have manfully carried out what *they* believed to be the donor's intention by construing "and" as "or" (*q*). Is it reasonable that a *mistake* on the part of the donee as to the precise scope of his authority in distributing the donor's bounty should render, as the preamble of the new act, which we are now considering, says, "the execution of the power invalid?" This is not, it must be remembered, a question of *fraud*, properly so-called. Where there is any collusive arrangement between the donee of the power and his appointee, equity will still relieve against this fraud upon the power (*r*). The jurisdiction of courts of equity in setting aside illusory appointments was, as Lord St. Leonards has pointed out (*s*), "infinitely more strong" (*i. e.*, strained or far-fetched) "than the common relief in cases of fraud."

The effect of the present enactment will be that all refinements about "such" and "and," and "or," will be consigned to the limbo of "illusory appointments," and *all powers of appointment will henceforth be exclusive, unless the donor "declares the amount or the share or shares from which no object of the power shall be excluded, or some or one or more object or objects of the power shall not be excluded."* Thus will at length be carried out the purpose which Lord St. Leonards had

(*o*) *Bevil v. Rich*, 1 Ch. Ca., 309; *Burrell v. Burrell*, Amb., 660.

(*p*) See, *e. g.*, *Burleigh v. Pearson*, 1 Ves., 281.

(*q*) *Swift v. Gregson*, 1 Term Rep., 432; *Brown v. Higgs*, 4 Ves., 708.

(*r*) See the cases collected, 1 White & Tudor's L. C. in Eq., under *Aleyn v. Belchier*, 377, 4th ed. (1872).

(*s*) Sugden on Powers, c. 12, s. 2, p. 607, 8th ed.

in view when he passed the Act of 1830:—"I wish by this measure," he said, "to induce persons to point out *specifically* how the property shall be applied—that is the object of my measure." "Any person who may be desirous of bestowing a portion of any given sum upon a particular individual, requires only to express his desire, in order to have it scrupulously enforced" (t).

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

As no date is specified in the body of the act as the period of its commencement, it came in force on the 30th July, 1874, the day on which it received the Royal Assent (u).

SECTION 1.

Appointments to be valid notwithstanding one or more Objects excluded.

That no appointment, which from and after the passing of this act shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power.

This section is copied, as far as the difference between the enactments would admit, from the 1st section of Lord St. Leonards' Act.

(t) Hansard's Parliamentary Debates, New Series, vol. xxii., pp. 365, 919. N.B.—Lord Selborne has kindly expressed to the writer his approval of the construction put in the text upon the effect of the new act.

(u) 33 Geo. 3, c. 13. *Nares v. Rowles*, 14 East, 510.

A good illustration of the mischief which this act is intended to remedy is afforded by the case of *Minchin v. Minchin* (x). In that case Mary Anne Minchin had power to appoint 5,000*l.*, the terms of the power being "amongst her children as she should appoint," and she appointed 500*l.* apiece to each of her eight daughters, and the residue to her "dearest little boy Tommy." It so happened that she left sixteen children "her surviving," eight sons and eight daughters. The Irish Master of the Rolls (y) held that the appointment was void, although Mary Anne directed that it was her will that the portions of her son, Tommy, dying under twenty-one, and of any of the daughters dying under twenty-one, unmarried, should accrue to her "other sons" on attaining twenty-one. The Attorney-General (Sir Joseph Napier) ingeniously argued that Mrs. Minchin might, under Lord St. Leonards' Act, have appointed a farthing apiece to the "other sons," and that the contingent bequest to them was more beneficial than the bequest of seven farthings. The Master of the Rolls said, that between the words "amongst" and "her children" he must insert the words "all and every," on the strength of a decision of Lord Alvanley, Master of the Rolls (z). He then proceeded:—"It is said that since the Statute as to Illusory Appointments, a farthing might have been appointed to each of the sons excluded from any immediate benefit, and that, if so, the contingent bequest to them is more beneficial than the bequest of a nominal sum, and that therefore the appointment is valid. Such an argument, I believe, was never addressed to any court up to the present case (a). The statute made the appointment of a nominal or illusory share, which was a valid appointment in law, also valid in equity; but it did not make that which was an invalid appointment, both at law and in equity, because some of the objects of the power were excluded, valid in equity. The recital in the statute shows what the law was; and it is clear that when the power does not authorize an exclusive appoint-

(x) 3 Ir. Ch. Rep., 167.

(y) The Right Hon. T. B. C. Smith.

(z) *Kemp v. Kemp*, 5 Ves., 849.

(a) Decided in 1853.

ment, *a share, however small, must be appointed to each child.*" And Mr. Smith ordered that the 5,000*l.* were distributable as in default of appointment (*b*).

SECTION 2.

Proviso.

Provided always, and be it enacted, that nothing in this act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded.

This section is copied verbatim from the second section of Lord St. Leonards' Act, with the addition of the words at the end, "or some one or more object or objects of the power shall not be excluded." Where it is intended that a party shall have a power to divide the fund amongst several objects in *substantial* proportions, according to his discretion, but shall not be at liberty to give merely a nominal share to any, the *smallest* sum which the person creating the power would wish each of the objects in any event to have should be named; and it should be declared that the donee of the power shall not be at liberty to appoint a less sum to any of the objects (*c*).

(*b*) Mrs. Minchin was in error in thinking that she had power to appoint 1,000*l.* of the 5,000*l.* by will, as she had only a power to do so jointly with her husband, unless she survived him; but this does not affect the point for which the case is cited.

(*c*) Sugden's Vendors and Purchasers, pp. 450, 451, 14th ed.

N.B.—The following are recent cases in which the appointment has been held bad, though intended to be good. *Bulteel v. Plummer*, 39 L. J. (Ch.), 805; *Mackenzie v. Marjoribanks*, *Ib.*, 605.

III. REAL PROPERTY LIMITATION.

37 & 38 VICT. c. 57.

AN ACT FOR THE FURTHER LIMITATION OF ACTIONS AND SUITS RELATING TO REAL PROPERTY.

THE Real Property Commissioners, in their First Report, justify the limitation of actions for the recovery of real property on the following grounds :—" It might at first sight be considered that the duration of wrong ought not to give it a sanction, and that the long suffering of injury should be no bar to the obtaining of right when demanded. But human affairs must be conducted on other principles. It is found to be of the greatest importance to promote peace by affixing a period to the right of disturbing possession. Experience teaches us, that owing to the perishable nature of all evidence, the truth cannot be ascertained on any contested question of fact after a considerable lapse of time. The temptation to introduce false evidence grows with the difficulty of detecting it ; and, at last, long possession affords the proof most likely to be relied upon of the right of property. Independently of the question of right, the disturbance of property after long enjoyment is mischievous. It is accordingly found both reasonable and useful that enjoyment for a certain period of time against all claimants should be considered conclusive evidence of title " (d).

" The most extensive grievance," however, " in our civil institutions was the insecurity of property for want of a reasonable time of limitation " (e). The beginning of the reign of King

(d) First Report of the R. P. Commissioners, 39 ; and see per Lord St. Leonards in *Dundee Harbour v. Dougall*, 1 Macq. H. L. C. 321 ; Broom's Legal Max. 343, 892 (5th ed.).

(e) Per Lord Denman, C. J., in *Fellows v. Clay*, 4 Q. B. 354.

Henry I., the reign of King Richard I., the last return of King John out of Ireland into England, the coronation of King Henry III., the first voyage of King Henry III. into Gascony, were the periods of limitation successively selected (*f*) in Anglo-Norman times, and continued, some of them, till the reign of King Henry VII., although the lapse of centuries rendered the selection of fresh starting-points necessary to the security of titles. In the reign of Henry VII., the Wars of the Roses having unsettled all property, the legislature rushed to the opposite extreme and fixed a five years' limit by fine and non-claim (*g*).

"The Statutes of Limitations, previous to that of the reign of William IV., operated by way of bar to the *remedy*, and not as a bar to the right" (*h*); but by the 34th section of the Statute of Limitations of William IV., when the remedy is barred by time, the right and title of the person whose remedy is taken away, is extinguished also. "This," says Lord St. Leonards (*i*), "is a great improvement." The improvement is preserved by the 9th section of the new act (*infra*). The 34th section of the Statute of Limitations of William IV. is as follows:—

"At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, *the right and title* of such person *to the land, rent, or advowson* for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period *shall be extinguished*."

The words of this enactment are very clear and forcible. In *Hanks v. Palling* (*k*), the court asked whether the section did more than extinguish "the right to sue?" "There does not," observes Lord St. Leonards (*l*), "appear to be sufficient founda-

(*f*) See Stat. of Merton (20 Hen. 3), c. 8; Stat. West. I. (3 Edw. 1), c. 39.

(*g*) 4 Hen. 7, c. 24.

(*h*) See *Berkford v. Wade*, 17 Ves. 87; *Incorporated Society v. Richards*, 1 Dru. & War. 289; 1 Wms. Saunders, 283 a, n.; 2 B. & Ad. 413; 1 B. & Ald. 93.

(*i*) New Laws of Real Property, pp. 1, 8 (2nd ed.).

(*k*) 6 E. & B 659.

(*l*) New Laws of Real Property, p. 9 (2nd ed.).

tion for this doubt. It is not the right to sue that is barred, but the *right and title* to the subject itself which is extinguished."

The effect of the limitations imposed by these statutes is to confer a title on the party who has been in possession for the specified period, which the former owner cannot disturb,—a title which the new owner is competent to convey to another, and, consequently, such a title as a court of equity, if its aid be invoked, will *force upon a purchaser (m)*.

Every reduction in the periods of limitation must, therefore, *pro tanto*, facilitate the TRANSFER OF LAND.

Preamble.

Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon.

"As knowledge," said the Real Property Commissioners (n), "is diffused, and the administration of justice becomes regular and pure, the periods of limitation may be safely abridged. By the statute 32 Hen. 8, c. 2, the period of limitation was reduced to sixty years from 352, at which it then stood; and by 21 James 1, the period was again reduced, for all practical purposes, to twenty years." In fixing twenty years as the period of limitation, in all cases, for the recovery of real property, the framers of the act of William IV. were, according to their own admission, following a precedent now 250 years old; and "knowledge" is certainly more "diffused," and the "administration of justice" is certainly more "pure and regular" now, than they were in the reign of James I. The Lord Chancellor, when introducing the bill on which the act now under discussion was founded, said that "it has been for some time felt as a crying evil that the

(m) See *Scott v. Nixon*, 3 Dru. & War. 388; *Lethbridge v. Kirkman*, 25 L. J. (Q. B.) 89; *Tuthill v. Rogers*, 6 Ir. Eq. Rep. 441; *Moulton v. Edwards*, 1 De G., F. & J. 250; Real Property Statutes, p. 9.

(n) First Report, pp. 42, 43.

periods [of limitation] should be so long" (o). Mr. Edward Lee Rowcliffe, adopting Lord St. Leonards' view about the effect of limitations of actions on the length of titles, stated, in reply to the Land Transfer Commissioners (p), that "the periods prescribed by the Statute of Limitations might well be shortened, and if ten years' adverse possession gave a title instead of twenty (and he saw no good reason for the longer period), he had no doubt that a ten years' title would soon be deemed as satisfactory as a twenty years' title, and titles would thereby be greatly simplified."

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

The date at which the new act is to come in force is fixed by the 12th section. See the notes to that section, *infra*, where reasons for fixing so remote a date are stated.

SECTION I.

No Land or Rent to be recovered but within Twelve Years after the Right of Action accrued.

After the commencement of this act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but *this does not apply to rent due on a demise* within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued *On 12th Dec 1874* to some person through whom he claims; or if *LR 32 509* such right shall not have accrued to any person through whom he claims, then within *twelve* years

(o) Hansard's Parliamentary Debates, Third Series, vol. cxxviii. p. 329.

(p) Land Transfer Commission, App. 63.

next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

Lord Cairns, when introducing the bill on which this act is founded, explained that the periods of twelve and six years, in substitution for those of twenty and ten, had been taken from recent legislation for India. "It is very hard to say," said the Lord Chancellor, "what should be the periods of limitation. I propose to take the periods which have been adopted in recent legislation in regard to India, to shorten the period of twenty years in the act of William IV. (*q*) to twelve years, and the period of ten years to six. The limitation in respect of succession claims I propose should not go beyond thirty at the utmost" (*r*). Lord Selborne said:—"I am glad to find that my noble and learned friend has adopted the principles of the bill of last session" (1873) "with respect to limitation, although he has adopted the periods of twelve years and six, instead of ten and five, which I proposed last year. There may, no doubt, be some reasons in favour of the slightly-longer periods which my noble and learned friend proposes" (*s*). Obviously ten years and five were selected by Lord Selborne as reducing the periods fixed by the statute of William IV. by exactly one-half, and his lordship so stated when introducing the bill of 1873 (*t*).

It will be perceived that the title of the new act corresponds with that of the statute of William IV. :—"An Act for the Limitation of Actions *and Suits* relating to Real Property." The section now under discussion accordingly provides, that "no person shall bring any action, *or suit*, to recover any land or rent," but within the time limited; and the expression "action or suit" also occurs in subsequent sections of the new act (*u*).

(*q*) 3 & 4 Will. 4, c. 27.

(*r*) Hansard's Parliamentary Debates, Third Series, vol. ccxviii. p. 329 (March 26th, 1874).

(*s*) *Ibid.* p. 332.

(*t*) *Ibid.* vol. ccxv. pp. 1132 *et seq.*

(*u*) Sects. 2, 3, 4, 5, 7, 8 and 10.

The expression "action or suit" occurs in the Statute of Limitations of Will. IV. in the 34th section (extinguishing the right with the remedy), the 29th, 30th, 32nd and 33rd sections (relating to ecclesiastical corporations sole and to advowsons), and in the 40th, 41st and 42nd sections (relating to money charged upon land, legacies, dower, rent reserved, and interest). In the 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 11th, 15th, 16th, 17th, 18th, 20th, 21st and 22nd sections of the Statute of Limitations of Will. IV., the word "action" occurs alone, unaccompanied by "suit;" but the 24th section, which, by the operation of the 9th section of the new act is incorporated with it, enacts that "no person claiming any land or rent in equity shall bring any *suit* to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an *action* to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity."

In the case of the sections substituted by the new act for corresponding sections in the old act—*i. e.* ss. 1 to 5—sect. 24 of the old act is rendered superfluous by the insertion of the words "or suit" everywhere after the word "action;" but sect. 24 of the old act is still applicable to sects. 4, 7, 8, 9, 11, 15, 18, 20, 21 and 22 of the old act (*x*). In two sections of the old act the word "suit" is used alone (the 25th and 26th); but these sections relate exclusively to suits in Chancery (in cases of trust and fraud).

By Order I., Rule 1, of the schedule to the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), it is provided as follows:—"All *actions* which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all *suits* which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the High Court of

(*x*) It is to be regretted that the act of Will. 4 was not repealed and re-enacted with the necessary amendments.

Probate, shall be instituted in the High Court of Justice by a proceeding to be called an '*action*.'"

That the words "or suit" were inserted with due deliberation is evident from the circumstance that, having been omitted in two or three places in the bill as originally introduced (*y*), the omission was repaired in committee in the House of Lords, by the insertion of the words. In one section of the new act (*z*) the words "action or" were inserted in the Lords before "suit."

The Supreme Court of Judicature Act, 1873, from the first clause of the schedule to which Order I., Rule 1, of the Supreme Court of Judicature Act, 1875, is copied, was not, it must be observed, in force when the Real Property Limitation Bill of 1874 was framed, and it was known that the former would need to be largely amended, and it was by no means certain that the schedule to it would be allowed to stand. The Real Property Limitation Bill of 1874 was, moreover, copied, to a great extent, from the Real Property Limitation Bill of 1873.

The desire of the framers of the new act was evidently to make the bar by effluxion of time effectual in *every court* in the realm; and no more comprehensive phrase could have been used, under the law then in force, than "action or suit."

The 1st section of the new act is substituted, by the operation of the 9th section (*infra*), for the 2nd section of the Statute of Limitations of Will. IV. (3 & 4 Will. 4, c. 27). The period of accrual of the right to make an entry or distress, or to bring an action or suit, is fixed by the 3rd section of the Statute of Limitations of Will. IV., which, by the operation of the 9th section of the new act, is incorporated with it. The portion of the 3rd section of the old act relating to estates in possession is as follows:—

"In the construction of this act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; that is to say:—

1. "When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the

(*y*) In, *e. g.*, sections 2 and 5 of the new act.

(*z*) Sect. 7, relating to "foreclosure suits."

estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and

2. "When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and
3. "When the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument."

An important effect of the 2nd section of the old act, taken in connection with the 3rd section of that act, was to put an end to the interminable discussions in courts of justice as to whether the possession of the person holding the land without title was "adverse" or not^(a).

A few explanatory remarks respecting the quaint expressions used in this section may not be out of place. "Dispossession"

(a) *Nepean v. Doe*, 2 M. & W. 894, 911; 2 Smith's L. C. 562, 7th ed. (by Collins & Arbuthnot).

means the actual ouster or expulsion of a person having a right to the possession (*b*). "Discontinuance" means the quitting possession of what the person had a right to possess, followed by actual possession on the part of another (*c*). Although the statute provides in the same sentence, both for the case of land of which a party is dispossessed, and for that of rent which he has ceased to receive, the statute must be read, *reddendo singula singulis*, *i. e.*, fixing the actual moment of dispossession or discontinuance of possession at the point from which the [twelve] years are to run in the case of land, of which a person has at some moment of time ceased to be in the actual possession; and the last annual payment of rent as the point from which the [twelve] years are to run in the case of a person ceasing to receive rent (*d*). The expression "in the possession or receipt of the profits of the land," is equivalent to "in the possession or receipt of the actual proceeds of the land." "Receipt of profits" does not mean receipt of rent from the land; and these words were, no doubt, introduced to prevent any question arising where the owner, although he received the proceeds, *did not actually occupy* the land (*e*). It was held in *James v. Salter* (*f*), that the 3rd section only treats of cases in which doubt and difficulty might occur, and is not an exhaustive list of possible cases which may arise under the 2nd section.

SECTION 2.

Provision for case of future Estates.

A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at

(*b*) Brown's Stats. of Limitations, 445.

(*c*) *Cannon v. Rimington*, 12 C. B. 1; *Austin v. Llewellyn*, 9 Ex. 276; *Smith v. Lloyd*, 9 Ex. 562; *M'Donnell v. M'Kinty*, 10 Ir. L. R. 574; Brown's Stats. of Limitations, 446.

(*d*) *Owen v. De Beauvoir*, 16 M. & W. 564; New R. P. Statutes, 37 (2nd ed.).

(*e*) Sugden's New R. P. Statutes, 47 (2nd ed.).

(*f*) 3 Bing. N. C. 544; 4 Scott, 168; 5 Dowl. P. C. 496.

the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land *or rent*, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent.

This enactment is substituted, by the operation of the 9th section (*infra*), for the 5th section of the Statute of Limitations of William IV. (3 & 4 Will. 4, c. 27). The proviso at the end is intended to show that the fact of the grantor of the particular estate having been in possession before he created it, does not exclude him from the benefit of the rule that the statute only runs from the date at which the future estate becomes an estate in possession. The words "or suit," in the above phrase "action or suit," were not in the bill on which the act is founded, as originally introduced. They were inserted subsequently in the Lords. Opportunity, it will be seen, has been taken to rectify in the section now under discussion an omission, which occurred in the 5th section of the Statute of Limitations of William IV., for which it is substituted, the words "*or rent*" being added after "such land," in the phrase, "notwithstanding the person claiming such land [or rent.]" "As in every other part of the section where land is mentioned, rent is mentioned also, it seems clear that claims for rent are included in the section, and it is apprehended that the omission was merely accidental" (g).

Another and more important addition has been made in this section. The words "or remainder, or other future estate or interest," have been inserted after "reversion." The absence of the words "or remainder, or other future estate or interest," after the word "reversion" in the 5th section of the Statute of

(g) Darby & Bosanquet on "The Statutes of Limitations," ch. v. (p. 234).

Limitations of William IV., while these words are inserted after "reversion" in the last clause of the 3rd section of that statute, has occasioned some perplexity. As the 4th clause of the 3rd section of the old act relates to future estates, and is incorporated with the new act by the operation of the 9th section (*infra*) of the latter, it is here set out:—

"When the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

Lord St. Leonards was of opinion that this definition of a future estate was sufficient, and did not need to be supplemented by the enactment now under discussion (sect. 5 of the old act) (*h*).

The words "or other future estate or interest," comprehend future estates, however created (*i*).

The 20th section of the Statute of Limitations of William IV., which, by the operation of the 9th section (*infra*), is incorporated with this act, relates also to future estates, and has an immediate bearing on the construction of the section now under discussion:—

"When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility,

(*h*) New R. P. Statutes, p. 51.

(*i*) *James v. Salter*, 3 Bing. N. C. 554; *Doe d. Johnson v. Linsedge*, 11 M. & W. 577; *Jumpeu v. Pitchers*, 13 Sim. 327; New R. P. Statutes, p. 22 (2nd ed.).

unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession."

Sect. 20, which is somewhat crabbed in its phraseology, is thus neatly paraphrased by Mr. Brown (*k*):—

"Where any person has been barred of any estate or interest in possession of any land or rent by the determination of the period of limitation, and has, during that period, been entitled to any future estate, interest, right or possibility in the same land or rent, no *new* right accrues to such person on such future estate, interest, right or possibility coming into possession (*l*). But if, before such future estate, interest, right, or possibility come into possession, the land or rent has been recovered by some person entitled to an estate, right, or interest, limited or taking effect after or in defeasance of the estate or interest in possession, a *new* right accrues to the person claiming such future estate, interest, right or possibility on its coming into possession."

Thus, where an estate was limited to A. B. and his wife and to his heirs and assigns, and A. B. absconded, and his wife took possession and continued in possession till her death; it was held, that the possession by the wife came within the saving of the 20th section, and gave her husband's assignees in bankruptcy a *new* right to the remainder in fee; the "recovery" contemplated by that section not being necessarily a recovery by virtue of legal process (*m*). The right of the heirs of the husband was held to be a "future estate" within the meaning of the 4th clause of the 3rd section of the Statute of Limitations of William IV.

The 5th clause of the 3rd section, and the 4th section of that statute (which are preserved by the 9th section of the new act), declare that, "when the person claiming such land or rent, or the person through whom he claims, shall have become entitled

(*k*) Stats. of Limitation (bk. iv. c. 4, s. 3), p. 457.

(*l*) *Doe d. Hall v. Mouldsdale*, 16 M. & W. 689; *Clarke v. Clarke*, Ir. L. R. (Q. B.) 395.

(*m*) *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken. Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

"The proviso" (which forms section 4 of the old act), "upon the ground that a man should not be *compelled* to take advantage of a forfeiture or of a condition broken, properly gives a *new* right to the reversioner or remainderman, where he has not already recovered, when his estate becomes an estate in possession, just as if no such forfeiture or breach of condition had happened" (n). The general rule applicable to future estates, laid down by the 3rd clause of the 3rd section, is in fact, in this case, freed from the exception engrafted upon it by the 4th clause of the same section.

Time limited to Six Years when Person entitled to the particular Estate out of Possession, &c.

But if the person last entitled to any particular estate on which any future estate or interest was expectant *shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined*, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within *twelve* years next after the

(n) New R. P. Statutes, p. 51.

time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within *six* years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect *after* the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as afore-said, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

This is new.

In order to ascertain the precise intention of the legislature in passing this new enactment, it is necessary to turn to the speech of Lord Selborne, when he, as Lord Chancellor, introduced the Land Titles and Transfer Bill of 1873, to which the Real Property Limitation Bill of that year, containing this new enactment, was ancillary (*o*).

“By the act of William IV. a reversioner, becoming entitled in possession after the tenant for life preceding him has been dispossessed, is allowed the full period of twenty years from the time when his own right to possession accrues to bring an action or suit, however long the previous dispossession may have

(*o*) Hansard's Parliamentary Debates, Third Series, vol. ccxv. pp. 1132 *et seq.*

lasted; and it is possible that, by a succession of several life estates, perhaps created under resettlements made after the dispossession, successive rights of action for twenty years might go on accruing in this way during an extremely long period of time. It is proposed to give any such reversioner either ten years (*p*) from the time when the preceding tenant for life was dispossessed, or five years (*q*) from the time when he himself became entitled to the possession—whichever of these periods may be the longest—and no more.”

The concluding clause of this proviso, attached to the second section of the new act, Lord Selborne then went on to explain as follows:—“And if the right of any one reversioner is barred, it is proposed that the bar shall also extend to any subsequent reversioner, whose title is derived from any deed, will or instrument, executed or first taking effect after the original dispossession commenced” (*r*).

The evil of allowing *each* remainderman twenty years within which to assert a right of action was frequently commented upon by Mr. Hayes, and other eminent writers. It was the hobgoblin conjured up to frighten the legislature from shortening the length of title that a purchaser could demand. A series of successive life estates may extend over eighty years and more, and the indefatigable statute has to recommence running at the death of each tenant for life. There could be no security for titles, it was said, unless at least a sixty years’ investigation were made.

The present enactment mitigates the evil, by giving the re-

(*p*) Twelve years under Lord Cairns’ bill.

(*q*) Six years under Lord Cairns’ bill.

(*r*) The *Solicitors’ Journal* (vol. xviii., No. 51, Oct. 17th, 1874) thus concisely sums up the proviso attached to the 2nd section of the new act:—“If the person entitled to the last preceding estate was out of possession, the period of limitation shall be the longer of the two following periods, viz., twelve years from the time when the person out of possession first had the right of entry, or six years from the time when his successor’s estate became vested in possession. If the remainderman or reversioner is barred, all persons claiming subsequent estates under instruments taking effect after he became entitled to enter, are to be barred also.”

mainderman or reversioner only six years instead of twenty to pursue his claim, in case the person entitled to the particular estate shall have been out of possession: with this proviso, that if the person out of possession was dispossessed within six years of the time when the remainderman or reversioner became entitled to the possession, the remainderman or reversioner can avail himself of the privilege of treating the statute as running from the date of the dispossession of the person entitled to the particular estate, and substituting twelve years for six years, as the period of limitation. Of course, if the person entitled to the particular estate was dispossessed six years and one month previous to the date at which the remainderman or reversioner became entitled to the possession, the advantage of selecting the alternative date would be lost, as more than twelve years would have elapsed, counting six years backward and six forward, from the date at which the remainderman or reversioner became entitled to the possession (s).

Sir Charles Hall, V.-C., has kindly favoured the writer with the following explanatory note:—"That part of the enactment which begins, 'And if the right,' clearly applies only to a person deriving title under a person barred under the earlier part of the section; the object being to *prevent an extension* of time for asserting title in favour of a person deriving title under a person against whom time has begun to run, or has actually run."

SECTION 3.

In cases of Infancy, Coverture or Lunacy at the Time when the Right of Action accrues, then Six Years to be allowed from the termination of the Disability or previous Death.

If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have

(s) Lord Selborne has kindly expressed to the writer his approval of the construction put upon the new enactment in the text.

been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of *twelve years, or six years as the case may be*), hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within *six years* next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

This section is substituted, by the operation of the 9th section (*infra*), for the 16th section of the Statute of Limitations of William IV. (3 & 4 Will. 4, c. 27). "Absence beyond the seas" is omitted from the catalogue of "disabilities," provided for by the new act.

"Six years" is the period substituted by the 3rd section of the new act for the "ten years" fixed by the old act. Lord Selborne proposed that the period of ten years should be cut down to three years. It would appear that the period of six years was selected by Lord Cairns from the analogy of the 42nd section of the statute 3 & 4 Will. 4, c. 27 (*t*).

SECTION 4.

No Time to be allowed for Absence beyond Seas.

The time within which any such entry may be made, or any such action or suit may be brought

(*t*) Commenting on the period of three years fixed by the Real Property Limitation Bill of 1873, Lord Cairns, C., said:—"This proposal is the more remarkable, when we remember that the present law, which the bill does not propose to alter, allows a full-grown man six years within which to assert his claim to arrears of rent." (See, however, Lord Cairns' remarks [above cited] on the Bill of 1874.)

as aforesaid, shall not in any case after the commencement of this act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

This section is new.

Mr. Joshua Williams pointed out some time ago, that the dweller beyond seas is now in a very different position from that in which he was years ago, when communication was difficult and unfrequent, and that the time had come when this disability might be abolished (*u*).

"Absence beyond the seas," said Lord Selborne, when, as Lord Chancellor, he introduced the Land Transfer Bill of 1873 (*x*), "is no longer to be reckoned as equivalent to a disability." "I hope," he added, when replying to the criticisms upon his Real Property Limitation Bill, in the debate on the second reading, "due regard will be paid to the great increase in the facility of communications between all parts of the world. Formerly there were strong reasons for including absence beyond the seas as a cause of disability, but these reasons have of late years been much weakened, and your lordships will, I think, come to the conclusion that they may safely be disregarded altogether. . . . An act introduced by Lord Campbell has already abolished this saving with respect to actions for debt and other personal actions" (*y*).

(*u*) See the *Solicitors' Journal*, vol. xviii., No. 23 (4th April, 1874), p. 414. See *Watson v. England*, 14 Sim. 28.

(*x*) Hansard's Parliamentary Debates, Third Series, vol. ccxv. pp. 1132 *et seq.*

(*y*) "No person or persons who shall be entitled to any action or suit with respect to which the period of limitation, within which the same shall be brought, is fixed by the 21 Jac. 1, c. 16, s. 3, or by the 4 Anne, c. 16, s. 17, or by the 53 Geo. 3, c. 127, s. 5, or by the 3 & 4 Will. 4, c. 27, ss. 40, 41 and 42, and c. 42, s. 3, or by the 16 & 17 Vict. c. 113, s. 20, shall be entitled to any time, within which to commence and sue such action or suit, beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such

The person "absent beyond the seas" will, under the new act, be "dealt with just as if he were in this country" (z).

SECTION 5.

Thirty Years utmost Allowance for Disabilities.

No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within *thirty* years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such *thirty* years, or although the term of *six* years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

This section is substituted, by the operation of the 9th section (*infra*), for the 17th section of the Statute of Limitations of William IV. (3 & 4 Will. 4, c. 27). The words "or suit," in the phrase "action or suit," were not in this clause of the bill as

persons, being, at the time of such cause of action or suit accrued, beyond the seas." 19 & 20 Vict. c. 97, s. 10. By sect. 11 of the same act, it is also provided, that the fact of one joint debtor being beyond the seas at the time when the cause of action accrued, will not deprive the others of the benefit of the Statutes of Limitation; and the recovery of judgment against any who were not beyond the seas, will be no bar to an action against the absent debtors on their return. And for this purpose no part of the United Kingdom, nor the Isle of Man, nor the Channel Islands, are to be considered beyond the seas (sect. 12). Joshua Williams on Real Property, p. 309, 7th ed.

(z) Per Lord Cairns, in the debate of 1873 on Lord Selborne's Bill.

it was originally introduced. They were inserted subsequently in the House of Lords.

Lord St. Leonards, commenting on the 17th section of the Statute of Limitations of William IV., for which this section is substituted, plaintively remarked (a) : "The writer attempted, without success, to prevail upon parliament to shorten this period of limitation." The failure was, however, only temporary. The success of the present measure was assured by his lordship's previous efforts.

SECTION 6.

In case of Possession under an Assurance by a Tenant in Tail, which shall not bar the Remainders, they shall be barred at the end of Twelve Years after that Period, at which the Assurance, if then executed, would have barred them.

When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of *twelve* years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had

(a) Sugden's New Laws of Real Property, 2nd ed., p. 70.

not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of *twelve* years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

This section is substituted, by the operation of the 9th section (*infra*), for the 23rd section of the Statute of Limitations of William IV. (3 & 4 Will. 4, c. 27).

The other sections of the old act, specially relating to estates tail, are the 21st and 22nd, which are incorporated with the new act by the 9th section (*infra*).

The 23rd section of the old act was obviously selected for repeal and re-enactment, because it alone of the three sections, specially relating to estates tail, mentions the period of limitation—"twenty years."

"When the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within *the period hereinbefore limited*, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred."

"When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of *the period hereinbefore limited*, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

Before the passing of the Statute of Limitations of William IV., the period within which the issue in tail and remaindermen, ex-

pectant on the determination of estates tail, could enforce their rights were fixed by the Statute of Limitations of James I. (*b*). The statute of William IV. gives *time* practically the same effect in barring the issue in tail and the remainders over as, *an assurance* competent to bar them under the Fines and Recoveries Act (*c*).

The 21st section applies to cases where the prescribed period has run out against a tenant in tail during his life; and provides, in effect, that in such a case the right of all persons, whom he might have barred by any act of his own, shall be barred by the effluxion of time against himself.

The 22nd section applies to cases where the prescribed period has begun to run against a tenant in tail in his lifetime, but he has died before the completion of the prescribed period; and in such case the right of all persons whom he might have barred shall be barred by the effluxion of the time which would have sufficed to bar himself, if he had continued to live.

The 23rd section applies to cases where the tenant in tail has made an assurance, creating a *quasi* base fee, barring the issue in tail (*d*), but not the remaindermen expectant on the determination of the estate tail. In such a case, possession under the assurance for the prescribed period shall have the same effect of barring the remainders over, as if a recovery had been suffered under the old law (*e*), or a disentailing assurance, with no protector to the settlement, had been executed under the new, at the time when the assurance creating the base fee was made. Lord St. Leonards points out (*f*) that "the operation of the clause is not *strictly* to make time a bar, but to make time give a full operation to the assurance."

The 21st and 22nd sections define the period of limitation as "the period hereinbefore limited." The provisions consequently contained in the 14th section, and in the 16th, 17th and 18th

(*b*) 21 Jac. 1, c. 16, s. 1.

(*c*) Darby & Bosanquet's Statutes of Limitations, chap. xvi. p. 310.

(*d*) *Ibid.* p. 311; *Penny v. Allen*, 7 De G., M. & G. 409.

(*e*) See the First Report of the Real Property Commissioners, pp. 46, 79.

(*f*) New Real Property Statutes, pp. 86, 87.

sections, as amended by the new act (see the 3rd, 5th and 9th sections of it), apply to all cases where a bar is attempted to be set up under the 21st and 22nd sections of the old act. The 23rd section contains no reference to the earlier sections, so that sects. 14, 16, 17 and 18 have no application to it (g).

SECTION 7.

Mortgagor to be barred at end of Twelve Years from the Time when the Mortgagee took Possession or from the last written Acknowledgment.

When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any *action or suit* to redeem the mortgage but within *twelve years* next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such *action or suit* shall be brought but within *twelve years* next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to

(g) See Darby & Bosanquet's Statutes of Limitations, p. 316. See as to the 21st section, *Austin v. Llewellyn*, 9 Ex. 276; *Goodall v. Skerratt*, 3 Drew. 216; as to the 23rd section, *Morgan v. Morgan*, L. R., 10 Eq. 29; as to both, *Earl of Aberavenny v. Brace*, L. R., 7 Ex. 149, 173.

any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

This section is substituted, by the operation of the 9th section (*infra*), for the 28th section of the Statute of Limitations of William IV. (3 & 4 Will. 4, c. 27). There are no savings for disabilities of the mortgagor or his heirs in regard to the bar created

by this section. Where the mortgagor is, constructively, tenant at will to the mortgagee, the time does not begin to run against the mortgagee till the tenancy is determined. An acknowledgment by one only of two joint mortgagees is wholly inoperative.

No special provision was made by the Statute of Limitations of William IV. for the case of a mortgagee *out of* possession. A doubt suggested by Mr. Justice Patteson in *Doe d. Jones v. Williams (h)*, as to whether the mortgagee must enter or obtain a written acknowledgment of title to prevent his right from being barred, notwithstanding the payment of interest to him by the mortgagor, led to the passing of 7 Will. 4 & 1 Vict. c. 28 (*infra*).

SECTION 8.

Money charged upon Land and Legacies to be deemed satisfied at the end of Twelve Years if no Interest paid nor Acknowledgment given in Writing in the meantime.

No action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of

+ annuity charged on personal property within the Section Dower & D's 264

such payments or acknowledgments, if more than one, was given.

This section is substituted, by the operation of the 9th section (*infra*), for the 40th section of the Statute of Limitations of William IV. (3 & 4 Will. 4, c. 27).

It has been held, that within the scope of section 40 of the Statute of Limitations of William IV. are included foreclosure suits (*i*), writs of fi. fa. (*k*) and sci. fa. (*l*), final decrees of courts of equity for the payment of specific sums of money (*m*), vendor's lien for unpaid purchase-money (*n*) or other liens (*o*), all legacies, whether charged on land or not (*p*), including, of course, annuities (*q*), and, also, a residue bequeathed by will, or a share of such residue (*r*). The section not applying to the case of the personal estate of an intestate, sect. 13 of the statute 23 & 24 Vict. c. 38, was passed to remedy this omission. This enactment is as follows:—

“Whereas by the act of parliament of the third and fourth of William the fourth, chapter twenty-seven, section forty, it was enacted that after the thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit or other proceeding should be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any

(*i*) *Dearman v. Wyche*, 9 Sim. 570; *Sinclair v. Jackson*, 17 Beav. 405; *sed quare*. See *Wrixon v. Vyse*, 3 Dru. & War. 104; Sugden's New Real Property Statutes, 117.

(*k*) *Henry v. Smith*, 4 Ir. Eq. Rep. 502; 2 Dru. & War. 381; *O'Hara v. Creagh*, 3 Ir. Eq. Rep. 179; Long. & Town. 65; *Watson v. Birch*, 15 Sim. 523.

(*l*) *Waters v. Lidwill*, 9 Ir. L. R. 362.

(*m*) *Dunne v. Doyle*, 10 Ir. Ch. Rep. 502.

(*n*) *Toft v. Stephenson*, 7 Hare, 1; 1 De G., M. & G. 28.

(*o*) See *Du Vigier v. Lee*, 2 Hare, 326.

(*p*) *Sheppard v. Duke*, 9 Sim. 567; *Coope v. Cresswell*, L. R., 2 Eq. 116.

(*q*) *Roach v. Callen*, 6 Hare, 531; *Askwell's will*, John. 112; *Nannock v. Horton*, 7 Ves. 391; *Cornfield v. Wyndham*, 2 Coll. 184; *Sibley v. Perry*, 7 Ves. 522.

(*r*) *Prior v. Horniblow*, 2 Y. & C., Ex. 201; *Christian v. Devereux*, 12 Sim. 264. See also *Dinsdale v. Dudding*, 1 You. & Coll. C. C. 265; *Adams v. Barry*, 2 Coll. 285.

legacy, but within *twenty* years next after a present right to receive the same should have accrued to some person capable of giving a discharge for or release of the same, unless such acknowledgment in writing or payment of principal or interest as therein mentioned should have been given or made, and then within *twenty* years next after such payment or acknowledgment, or the last of such payments and acknowledgments: and whereas it is expedient that the said enactment should be extended to the case of claims to the estates of persons dying intestate: be it therefore enacted, that no suit or other proceedings shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within *twenty* years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within *twenty* years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given" (s).

Mr. Shelford, in his work on the Real Property Statutes, observes, that "no provision appears to have been made for the case of claims to a residue undisposed of by will" (t).

As no reference is made to the stat. 23 & 24 Vict. c. 38, s. 13, in the new act, it is apprehended that the period of limitation for the recovery of the personal estate of an intestate will still be *twenty* years, even on and after the 1st of January, 1879.

The effect of the 10th section of the new act upon the exception of express trusts from the operation of this section is dealt with in the notes upon the 10th section. (*infra*).

(s) See, on this enactment, *Reed v. Fenn*, 35 L. J. (Ch.) 464; *Cresswell v. Dewell*, 4 Giff. 460.

(t) Shelford on the Real Property Statutes, 8th ed. p. 244.

SECTION 9.

Act to be read with 3 & 4 Will. 4, c. 27, of which certain Parts are repealed, and other Parts to be read in reference to alteration by this Act.

From and after the commencement of this act all the provisions of the act passed in the session of the *third and fourth* years of the reign of his late Majesty King *William the Fourth*, chapter *twenty-seven*, except those contained in the several sections thereof next hereinafter mentioned, *shall remain in full force, and shall be construed together with this act*, and shall take effect as if the provisions hereinbefore contained were substituted in such act for the provisions contained in the sections thereof numbered *two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty* respectively (which several sections, from and after the commencement of this act, *shall be repealed*), and as if the term of *six* years had been mentioned, instead of the term of ten years, in the section of the said act numbered *eighteen*, and the period of *twelve* years had been mentioned in the said section *eighteen* instead of the period of twenty years.

As the new act is by this section incorporated with the Statute of Limitations of William IV., or rather that statute with this, it follows that the provision of the 44th section of that act, "that this act shall not extend to Scotland," applies to the new act also.

The 1st section of the Statute of Limitations of William IV. fixes also the meaning in the new act of the words "land," "rent," "person" and "person through whom another claims." The 1st section of that act defines, "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall, in this act, except where the nature of the provision or the context of the

act shall exclude such construction, be interpreted as follows; (that is to say,) the word '*land*' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word '*rent*' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and '*the person through whom another person is said to claim*' shall mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word '*person*' shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons as well as an individual."

"'*Land*,' in the Statute of Limitations, includes no incorporeal hereditament, except tithes other than those excepted by the interpretation clause. The incorporeal hereditaments which form the subject-matter of the 2nd section are comprised in the word '*rent*;' and '*rent*' in this section does not mean rent reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation, but *rent existing as an inheritance distinct from the land*" (u).

Lord Selborne, in his speech, when introducing the Land Titles

(u) *Grant v. Ellis*, 9 M. & W., 113; *Re Turner*, 11 Ir. Ch. Rep., N. S. 304; *Archbold v. Scully*, 9 H. L. Ca. 360; Darby & Bosanquet on the Statutes of Limitations, p. 287. In some of the other sections, *e.g.*, the 42nd, the word "*rent*" also means "*rent reserved*."

and Transfer Bill of 1873, referred to a further effect which the section now under discussion would have:—"I should state that these periods of limitation do not apply at all (x) as between trustee and *cestui que trust*; and, in case of concealed fraud, the time only begins to run from the discovery of the fraud" (y).

The sections of the Statute of Limitations of William IV., dealing with the questions here referred to, and, by the effect of the 9th section of the new act, incorporated with it, are the 25th and 26th. The 25th is as follows:—

"When any *land or rent* shall be vested in a trustee upon any *express trust*, the right of the *cestui que trust* or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

The effect of section 25 is to save the right of the *cestui que trust* against the trustee (and volunteers claiming through him), but not against purchasers *for value* from the trustee (z).

The 26th section is as follows:—

"And be it further enacted, that in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any holder of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration who

(x) "To all" is the language of Hansard, but this evidently is a mistake.

(y) Hansard, Third Series, vol. ccxv. *ubi supra*.

(z) Brown on the Statutes of Limitations, p. 292; *Law v. Bagwell*, 4 Dru. & War. 398; and see *Att.-Gen. v. Magdalen College*, 6 H. L. Ca. 215.

has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed."

This section does not apply to the case of a party entering wrongfully into possession, but it applies to a case of designed fraud, by which a party knowing the rightful owner, conceals the circumstances giving the right, and who, by means of such concealment, is enabled to enter and hold (a).

The latter part of the 9th section of the new act provides, that the 18th section of the Statute of Limitations of William IV. shall "remain in full force," but "shall be construed as if six years had been mentioned instead of ten, and twelve instead of twenty."

Section 18 of the old act is as follows:—

"When any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of *twenty* years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of *ten* years next after the time at which such person shall have died, shall be allowed by reason of any disability of any *other* person."

The "disabilities hereinbefore mentioned" refer to those specified in section 16 of the old act, the list, however, being cut down by the excision of "absence beyond the seas" from it under section 4 of the new act (*supra*).

7 Will. 4 & 1 Vict. c. 28, to be read with this Act.

And the provisions of the act passed in the session of the seventh year of the reign of his late

(a) *Petre v. Petre*, 1 Drew. 397. See *Dean v. Thwaite*, 21 Beav. 621; Shelford's Real Property Statutes, 8th ed. p. 209, where the cases are collected.

Majesty King William the Fourth and the first year of the reign of her present Majesty, chapter twenty-eight, *shall remain in full force, and be construed together with this act*, as if the period of *twelve* years had been therein mentioned instead of the period of twenty years.

The provisions of the act 7 Will. 4 & 1 Vict. c. 28, are very short, and are as follows:—

“Whereas doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled ‘An Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto,’ so far as the same relates to mortgages; and it is expedient that such doubts should be removed: be it *declared* and enacted, that it shall and may be lawful for any person entitled to or claiming under any mortgage of *land*, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such *land* at any time within *twenty* years next after the last payment of any part of the principal money or *interest* secured by such mortgage, although more than *twenty* years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, any thing in the said act notwithstanding.”

Whether it was necessary for a mortgagee, not taking possession of the property mortgaged, to bring his action within twenty years from the day of default in paying the mortgage money, independent of payment of interest, or principal, was doubted in *Doe d. Jones v. Williams* (b). *Dearman v. Wyche* (c) seems to have been considered as decided on the ground of adverse possession, or at least as not decided on the ground of non-adverse possession (d). The consequence of this doubt, if well

(b) 5 Ad. & E. 291.

(c) 9 Sim. 570.

(d) 2 Con. & L. 150.

founded, was considered alarming to mortgagees, and hence (e) the statute 1 Vict. c. 28 (f).

The beneficial saving of this enactment is, it will be seen, confined to land, as defined by the first section of the Statute of Limitations of William IV. The object of this restriction is not clear; rent-charges may be, and sometimes are, the subject of mortgage, and it is hard to point out any reason why mortgagees of land (including tithes) should, by receiving interest, retain their right to bring an action to recover such land (or tithes), which does not equally hold good in favour of the right of a mortgagee of a rent-charge to recover such rent-charge by distress. It may, however, be considered pretty clear that receipt of interest on a debt secured by a mortgage of rent-charge will *not* have the effect of keeping alive the right of the mortgagee to dis-train for the rent-charge on the land out of which it issues (g).

SECTION 10.

Time for recovering Charges and Arrears of Interest not to be enlarged by express Trusts for raising same.

After the commencement of this act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and *secured by an express trust*, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and *so secured*, or any damages in respect of

(e) 2 Hare, 332; 10 Ir. L. R., N. S. 352.

(f) Brown on the Statutes of Limitations, p. 449. On the 7 Will. 4 & 1 Vict. c. 28, see *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Eyre v. Walsh*, 10 Ir. C. L. R. 346; *Ford v. Ager*, 2 H. & C. 279; *Doe d. Baddeley v. Massey*, 17 Q. B. 373; *Chinnery v. Evans*, 11 H. L. 115; *Wriwson v. Vyse*, 2 Dru. & War. 192; *Loftus v. Swift*, 2 Sch. & L. 642.

(g) Darby & Bosanquet on the Statutes of Limitations, pp. 354, 355.

such arrears, except within the time within which the same would be recoverable *if there were not any such trust.*

This section is new.

Lord Selborne, in his speech when introducing the Land Titles and Transfer Bill of 1873, thus summarized the existing state of the law upon the subject-matter of this section, and the change in that law effected by it (*h*) :

“Upon the construction of 3 & 4 Will. 4, c. 27, it has been judicially held that the period of six years, limited by the act, for the recovery of arrears of interest on a mortgage or charge (*i*) does not apply, if the term of years in the land has been vested and is still subsisting in a trustee for the creditor as part of his security, although such trustee may not have been in possession, or in receipt of any interest whatever, for a longer period than six years.

“It is proposed now to declare that the limitation of ten years (*h*) as to principal, and six years as to interest, shall henceforth apply to all such cases.”

The section relating to “principal” is the 8th of the new act, now substituted for the 40th of the Statute of Limitations of William IV. The 42nd section of the Statute of Limitations of William IV., which relates to “interest” on the “principal,” is unaltered by this act, with which, by sect. 9, it is incorporated :—

“No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within *six* years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was pay-

(*h*) Hansard, vol. ccxv. *ubi supra*. Lord Selborne has kindly expressed to the writer his approval of the construction put upon the 10th section in the note which follows.

(*i*) Or twenty years as to money charged on land, or legacies, &c.

(*h*) Twelve years under Lord Cairns's Act.

able, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of *six* years.

The 10th section of the new act destroys the strained construction put upon the 25th section of the Statute of Limitations of William IV., in a long series of cases commencing shortly after the passing of that statute, and culminating in *Burrowes v. Gore* (1), decided by the highest court of appeal in 1858. It restores the authority of *Know v. Kelly* (m), decided by Sir Francis Blackburne, when Master of the Rolls in Ireland, in 1844. In that case, one Coll Kelly by his will, dated 1792, devised all his estate and interest in the lands of Carroward and Liscarroward (of which he was seised in *quasi* fee under a lease for lives renewable for ever) to his son Patrick, by "paying 600*l.*," thus distributed:—"200*l.* with interest" for his daughter Helen; "200*l.* with interest" for his daughter Kate; and the residue (200*l.*) to his daughter Mappy. The bequest to Mappy was very quaintly worded:—"I order to my daughter Mappy Kelly 200, on she behaving, otherwise she is at the mercy of her mother, sisters, and brother Walter; but she is to receive but 5*l.* per cent., that is to say, 10*l.* per year; both she and sister Catty is (*sic*) to get their fortunes by 100*l.* to each when they are to be paid, that is, in eighteen months after each is married." There were limitations over in the event of their dying unmarried. The testator appointed his son Patrick his executor and trustee of his will; and directed that his debts and legacies should be paid "by his said trustee and executor." The testator died the same year, and his son Patrick entered

(1) 6 House of Lords Cases, 907.

(m) 6 Ir. Eq. Rep. 279.

into seisin and possession of the lands. Mappy Kelly became Mappy McDonnell. No payment was ever made in respect of the legacy to her; and no acknowledgment was ever given pursuant to the 40th section.

In 1840, the lands were sold under a decree of the Court of Chancery, but the purchaser objected that the legacy bequeathed, fifty-eight years before, to Mappy Kelly was still unpaid and remained a charge upon the lands. Patrick was then dead, and there was a receiver over the estates *In the matter of Coll Kelly, a minor*. Mappy was then also dead; but was represented by Malachy Kelly, her son-in-law, who obtained administration to her during the minority of his daughter Arabella, the only child of Damphina McDonnell, who was the only child of Mappy. The Master found that 636*l.* were due to Malachy for principal and for interest since 1792.

"The representative of the legatee" (Malachy Kelly), said the Right Hon. Francis Blackburne, M. R., "has not contended that more than six years' interest can be claimed (*n*), and, therefore, the only question that I am called upon to decide is, whether the demand for the legacy is barred by the 40th section of the 3 & 4 Will. 4, c. 27. The representative of the legatee insists that this being a case of a devise upon trust to pay a legacy, it is within the 25th section. But the subjects of the two sections are quite different; that of the 40th being *money*, that of the 25th being *land or rents*, in which it is impossible, from the interpretation clause, to comprise a gross sum of money charged on an estate. Am I then, in deference to authority, to hold that a trust of real estate to pay a sum of money is one giving a right against which the statute is never to operate?" His lordship then reviewed the Irish cases, showing that Lord Plunket (*o*)

(*n*) Thus admitting that the claim for fifty-two years' interest was barred by the 42nd section (*supra*) of the 3 & 4 Will. 4, c. 27. This enactment is identical with the 40th in its enumeration of principal sums; New Real Property Statutes, 139. See *Bolding v. Lane*, 3 Giff. 574. The cases on the 42nd section are collected in Shelford's Real Property Statutes, 249—258, 8th ed.

(*o*) *Burne v. Robinson*, 1 D. & W. 688; *S. C.* nomine *Byrne v. Robinson*, 1 Ir. Eq. Rep. 333; *Dillon v. Cruise*, 3 Ir. Eq. Rep. 82.

had left the question open. The authority of *Lord St. John v. Boughton*, decided, in 1838, in the English Court of Chancery by Sir Lancelot Shadwell, V.-C., he considered, on account of an observation of that judge in the course of the argument, "an authority impugning the position that a trust for payment of debts excludes the operation of the 40th section;" and he concluded as follows:—"It is impossible for me to decide against the plain and unambiguous words of the 40th section, and I must therefore decide that this legacy is barred by that express enactment of the 40th section of the act."

Yet, notwithstanding this decision, and the express words of the 25th section, confining its operation to "*any land or rent*," the current of authorities set in so strongly in favour of the opposite view, that Lord St. Leonards, when delivering his judgment in the case of *Burrowes v. Gore (p)*, in the House of Lords, said, "I think it is perfectly settled that a charge of this nature, to be raised by express trust, falls within the saving [of the 25th section] as much as if the express trust had been applied, not to charges upon the land, but to the land itself." "The Statute of Limitations," he said, "is very singularly framed with regard to matters of this nature (?), for in the earlier sections it only provides for trusts which affect the land or rent. But when you come to section 40 and so on, as to charges upon land, you have then no corresponding section with regard to trusts as to such charges. There is always a difficulty in applying the statute when you come to trusts, not with regard to the land itself, but with regard to charges upon land; but, however, I consider it perfectly settled, and rightly settled, that the construction is the same in either case" (*q*).

In the learned work of Messieurs Darby & Bosanquet on

(*p*) 6 House of Lords Cases, 907, 961.

(*q*) In the cases of *Burrowes v. Gore* the trust was created fifty years before the suit was brought, but the right of the plaintiffs, the *cestuis que trustent*, did not arise till two years before the suit, owing to the interposition of a protracted life interest in their father, so that the question as to whether the right to the charge was barred by the 40th section did not, except incidentally, arise. It is difficult to see on what ground Lord Wensleydale held that the statute began at law to run in 1816 (see 6 H. L. Cases, 966).

"The Law of Limitation as to Real Property," Chap. XIX., the following summary is given of the law upon this subject:—

"The 25th section follows the wording of the 24th, on which it seems to be engrafted as an exception applying only to claims to the same subject-matter as there referred to, viz., land or rent. No similar exceptions is made in direct terms for express trusts in these cases where the *cestuis que trustent* claim, not estates in land or rent, but charges on them which come within the provisions of the 40th and 42nd sections (*r*) . . and great difficulties were felt in deciding whether the 25th section applied in any way to save the rights of the *cestui que trust* in those cases (*s*). It was at one time decided in Ireland that it had no such operation, and that a legacy charged on real estate with a trust created for its payment was not saved by the 25th section from the operation of the 40th section (*t*). But the opposite view has been upheld in numerous cases and is sanctioned by the House of Lords (*u*); and it must be considered as now finally decided, that, notwithstanding the lapse of the periods specified in the 40th and 42nd sections, an express trust, created by deed or will for the payment of debts, portions or legacies out of land or rent, may be enforced against a trustee under the exception in section 25, or one engrafted on that section by analogy. And, therefore, that when an estate is vested in trustees in trust to pay annuitants or raise a gross sum of money, lapse of time will not bar any part of the claim of the *cestui que trust*, so long as the trustees retain possession of the land or the right to recover the same" (*x*).

(*r*) Messieurs Darby & Bosanquet here add, "and great hardships would be imposed on such a *cestui que trust* if he were barred of all remedy against a trustee holding on an express trust in his favour in the periods specified in these sections." But "hard cases make bad law."

(*s*) See *Law v. Bagwell*, 4 Dru. & War., 398, 408; *St. John v. Boughton*, 9 Sim., 219; *Young v. Wilton*, 10 Ir. Eq. Rep., 10.

(*t*) *Knox v. Kelly*, 6 Ir. Eq. Rep., 297 (*supra*); *Burne v. Robinson*, 1 Dru. & Walsh, 688.

(*u*) *Burrowes v. Gore*, 6 H. of L. Ca., 907, 961 (*supra*).

(*x*) *Hunt v. Bateman*, 10 Ir. Eq. Rep., 360; *Dillon v. Cruise*, 3 Ir. Eq. Rep., 70; *Young v. Waterpark*, 13 Sim., 204; 15 L. J. (Ch.) 63; *Dundas v. Blake*, 11 Ir. Eq. Rep., 138; *Blair*

Mr. Brown, in his able work on the same subject, lays down the doctrine deducible from the cases equally broadly:—

“As against the trustee and any person claiming through him without value, and whilst the relation between [the trustee or such person and the *cestui que trust*] continues, the right of the *cestui que trust*, in general, remains unaffected by time (y). The statute was not designed to interfere with the well-established principle of equity, that, as between an express trustee and *cestui que trust*, length of time creates no bar (z).”

SECTION 11.

Short Title.

This act may be cited as the “Real Property Limitation Act, 1874.”

There is, unfortunately, no “short title,” by which the Statute of Limitations of William IV. is known to the law.

v. *Nugent*, 3 Jo. & Lat., 658, 668 ; *Ward v. Arch*, 12 Sim. 472 ; *Gough v. Bult*, 16 Sim., 323 ; *Watson v. Saul*, 1 Giff., 188 ; *Cox v. Dolman*, 2 De G., M. & G., 592 ; *Shaw v. Johnson*, 1 Drew. & Sm., 412 ; *Snow v. Booth*, 8 De G., M. & G., 69 ; *Mansfield v. Ogle*, 2 L. J. (Ch.), 700 ; *Lewis v. Duncombe*, 29 Beav., 175 ; *Re Wyse*, 4 Ir. Ch. Rep., 297 ; *Blower v. Blower*, 5 Jur., N. S., 33 ; *Lawton v. Ford*, L. R., 2 Eq., 97 ; *Burrowes v. Gore*, *ubi supra*.

(y) *Attorney-General v. Flint*, 4 Hare, 147 ; *Daly v. Kirwan*, 1 Ir. Eq. Rep., 163 ; *Dillon v. Cruise*, 3 Ib., 83 ; *Hunt v. Bateman*, 10 Ib., 360 ; *Francis v. Grover*, 5 Hare, 39 ; *Phillips v. Mannings*, 2 Myl. & C., 309 ; *Petre v. Petre*, 1 Drew. 317 ; *Evans v. Bagwell*, 2 Con. & L., 617 ; *Tyson v. Jackson*, 30 Beav. 384 ; *Young v. Lord Waterpark*, 13 Sim., 204 ; 6 Jur., 656 ; 10 Ib., 1 ; *Burrowes v. Gore*, *ubi supra* ; *The Commissioners of Charitable Donations v. Wybrants*, 2 Jo. & Lat., 182.

(z) *Hunt v. Bateman*, 10 Ir. Eq. Rep., 360. See Brown on the Law of Limitation as to Real Property, bk. 4, c. iv. s. 3, p. 497 ; Sugden's Vendors and Purchasers, 14th ed. p. 478 ; Dart's Vendors and Purchasers, p. 381, 5th ed.

SECTION 12.

Commencement of Act.

This act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-nine.

The date fixed in the Real Property Limitation Bill of Lord Selborne was "1876," being an interval of two years and five months, or thereabouts. Lord Selborne, in his speech on introducing the Real Property Limitation Bill of 1873 (*a*), said (in justification of the selection of so remote a date as 1876):

"It is proposed, in order that any persons having claims, which would be barred by the shortened periods of limitation, may have a full opportunity of prosecuting them before this act comes into operation, to postpone its commencement until the 1st of January, 1876."

Lord Cairns, speaking in the debate on the second reading of Lord Selborne's Bill (*b*), observed: "I can easily imagine the case of a man in Australia, on a sheep farm, or at the gold diggings, who may acquire an interest in land by descent, or devise, or otherwise, who may not hear of it for some time, and who may, on returning to this country to assert his claim, be debarred from doing so." The long interval which will elapse before the new act comes in force will enable Englishmen, in all parts of the world, to become acquainted with the change in the law effected by section 4, and put them on the alert as to asserting claims to land in England.

The learning relative to the Statutes of Limitation will be found in Darby & Bosanquet's "Practical Treatise on the Statutes of Limitations," Brown's "Law of Limitations" (*c*), Sugden's "New Real Property Statutes" (*c*), and Shelford's "Real Property Statutes" (*c*), to which the reader is referred. A consolidating measure is greatly needed, incorporating some

(*a*) Hansard's Parliamentary Debates, vol. ccxvi. p. 341 *et seq.*

(*b*) *Ibid.*

(*c*) Published by H. Sweet, Chancery Lane.

of the leading decisions, and remedying the gross absurdity that two or more Statutes of Limitations contain conflicting enactments respecting the same identical subject-matter (*d*). It is not a little singular that the Fines and Recoveries Act (*e*)—that model of scientific and painstaking labour—was passed in the same session as those clumsy canons of Prescription, the 3 & 4 Will. 4, c. 27, and the 3 & 4 Will. 4, c. 42. Let us hope that some Peter Bellinger Brodie may arise in the profession, and enrich his country's law with a model Statute of Limitations. Meanwhile, the public and the profession have both reason to be grateful to the present and late Lord Chancellors for SIMPLIFYING THE TITLE TO AND FACILITATING THE TRANSFER OF LAND by the "*further*" limitation of litigation regarding it.

(*d*) *E.g.*, the conflicts between the 3rd section of the 3 & 4 Will. 4, c. 42, and the 3 & 4 Will. 4, c. 27, ss. 40, 42; and the 3rd section of 21 Jac. 1, c. 16, and the 3 & 4 Will. 4, c. 27, ss. 40, 42.

(*e*) 3 & 4 Will. 4, c. 74.



IV. REAL PROPERTY VENDORS AND PURCHASERS.

37 & 38 VICT. c. 78.

AN ACT TO AMEND THE LAW OF VENDOR AND PURCHASER, AND FURTHER TO SIMPLIFY TITLE TO LAND.

LORD SELBORNE, when the bill upon which this act is founded was introduced (*a*), observed, that this bill was "quite new and belonged altogether to the Lord Chancellor" (Lord Cairns). Lord Cairns said, that the bill was "wholly irrespective of the question of the registry of titles: its object was to facilitate transactions between vendor and purchaser" (*b*).

Preamble.

Whereas it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

No date being specified in the body of the act as the period of its commencement, it came in force on the 7th August, 1874, the day on which it received the Royal Assent (*c*).

(*a*) Hansard's Parliamentary Debates, vol. ccxviii. pp. 318—334 (March 26th, 1874).

(*b*) The 5th and 7th clauses, which have given rise to so much controversy, and are now repealed, were not contained in the bill, as originally introduced by Lord Cairns, C.

(*c*) 33 Geo. 3, c. 13; *Nares v. Rowles*, 14 East, 510.

SECTION 1.

Forty Years substituted for Sixty Years as the Root of Title.

In the completion of any contract of sale of land made after the thirty-first day of December, one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

This section, and the two next sections, are, it will be perceived, expressly limited to "any contract of sale of land made after the 31st day of December, 1874." The remaining sections came in force on the day of the commencement of the act.

Prior to 1540 the period of limitation was 352 years (*e*). The old Statute of Limitations of the reign of Henry VIII. (*f*), fixed "threescore years" as the limit of time within which a writ of right would lie for the recovery of lands and rents. The Statute of Limitations of the last reign (*g*) abolished real actions, and fixed forty years as the utmost limit of time for bringing an action to recover any land or rent. The right of a purchaser to require a sixty years' title was, in the opinion of Lord St. Leonards (*h*), "adopted strictly with reference to the time allowed for a real action." His lordship, therefore, concluded that, as the period of limitation for the recovery of lands and rents was reduced by the statute of William IV. from sixty

(*e*) Real Property Commissioners, First Report, p. 43.

(*f*) 32 Hen. 8, c. 2, s. 1.

(*g*) 3 & 4 Will. 4, c. 27, ss. 17, 36.

(*h*) Law of Vendors and Purchasers, p. 137, 10th ed. (1839).

to forty years, a corresponding reduction would follow in the length of abstracts of title. "If a clear title," he argued (*i*), "is shown for forty years, without anything upon the face of it to lead to an inference that it is derived under a tenant for life, I should apprehend that the purchaser would be compelled to accept it." "It seems difficult," he added, "to continue the period of sixty years as an arbitrary rule, when the object for which it was introduced will be effected by a forty years' title."

These too sanguine anticipations of Lord St. Leonards were, unfortunately, not realized. The point raised by him in 1839 was not settled by judicial authority till 1844, ten years after the passing of the statute of William IV.; but it was then settled by Lord Lyndhurst, sitting as Lord Chancellor (*k*), in a manner opposed to the view of Lord St. Leonards. "Several points," said Lord Lyndhurst, C., "and points of importance, were argued upon this appeal. The first and the most important was the effect of the statute 3 & 4 Will. 4, c. 27, as to the period to which a good title should extend since the passing of that act. It was supposed that, by the operation of that act, it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but that some shorter period would be proper. . . . I am of opinion that the statute does not introduce any new rule in this respect, and that to introduce any new rule, shortening the period, would affect the security of titles. The ground of the rule was the duration of human life, and that is not affected by the statute. . . . I think that the rule ought to remain as it is, and that it would be dangerous to make any alteration." Lord Lyndhurst also referred to the view of "a high authority," meaning Lord St. Leonards, but only to condemn it. Mr. Jarman (*l*) informs us that the masters in chancery had, prior to this decision, "continued to act upon the old rule, without any relaxation," and this is confirmed by Mr. Hayes (*m*), who adds, that the "practice of conveyancers," also,

(*i*) *Ibid.* 138.

(*k*) In *Cooper v. Emery*, 1 Phil. 388.

(*l*) 1 Byth. & Jarm. Conv. by Sweet, 60.

(*m*) 1 Hayes Conv. 285 (5th ed.).

"continued unaltered." That the rule of requiring a sixty years' title was based upon the length of human life, was the opinion of Mr. Brodie (*n*); but Mr. Jarman (*o*), Mr. Hayes (*p*), and Lord St. Leonards (*q*), all dissent from that view. Mr. Jarman observes,—“The probability is that, when it became necessary to establish the maximum extent to which abstracts of title under all circumstances shall reach, sixty years were fixed on as being the period when adverse possession would confer an unimpeachable title, with little or no regard to the case of a tenancy for life, or a tenancy in tail, either of which would evidently have suggested the necessity of *a more extended range of investigation*” (*r*). Mr. Brodie has placed on record his experience of “a person being tenant for life for more than eighty years;” and he yet argued, somewhat inconsistently, that “the present length of abstracts is with reference to the duration of human life” (*s*). Mr. Jarman shows, that, owing to the possibility of human life extending considerably beyond sixty years, a sixty years' title may be insecure, on account of the rule that a possession adverse to a tenant for life will not bar a remainderman, whose estate is expectant on the estate for life, or a reversioner. Under the Statute of Limitations (*t*), time does not begin to run against the remainderman or reversioner till “the time at which his estate becomes an estate in possession.” Mr. Jarman puts a case. “Lands are devised by will to A. by words, which are considered to carry the inheritance. A. sells and conveys (as is supposed), the fee simple. For more than sixty years the property is enjoyed under this conveyance, A. being alive throughout this period; but on A.'s death at an advanced age, the purchaser is roused from his dream of fancied security by an ejectment on the part of the testator's heir-at-law, who claims and recovers the property on the ground

(*n*) 1 Hayes Conv. 566.

(*o*) 9 Jarm. Conv. 417.

(*p*) 1 Hayes Conv. 290.

(*q*) Vendors and Purchasers, 137, 10th ed.

(*r*) 9 Jarm. Conv. 417, 418.

(*s*) 1 Hayes Conv. 566.

(*t*) 3 & 4 Will. 4, c. 27, s. 3.

that A., according to the true construction of the will, was devisee for life only; and the claim being made within twenty years after A.'s death would be saved by the Statute of Limitations. It is quite possible that the evicted purchaser may have been coerced into the specific performance of the contract by the decree of a court of equity" (u). This illustration is cited by Mr. Jarman as an argument against the view of Lord St. Leonards, that the statute 3 & 4 Will. 4, c. 27, would reduce the term of a marketable title to forty years; but it might be used as an argument against the sufficiency of even a sixty years' title. Mr. Hayes admits (x), that "a sixty years' title affords but a precarious guarantee;" that "unsoundness" of title may be "only skinned and filmed by even a sixty years' title;" and he cites (y) the following case, not an imaginary one like that cited by Mr. Jarman, but "a case occurring lately in practice." "An abstract commenced above sixty years ago, with a feoffment in fee, and the title was regularly deduced from that root, but a reported case (z) disclosed the fact that the feoffor was tenant for life only; an objection was consequently taken to the title, and, during the discussion, several claimants started up, and an ejectment was actually brought for the recovery of the estate." If a sixty years' title does not give absolute security to a purchaser, there can be no halo of sanctity environing the limit of sixty years. "Considerations of convenience," Mr. Hayes insists (a), led to the selection of the limit. "Considerations of convenience" may alter the limit which "considerations of convenience" have fixed. One "consideration of convenience," which points to the reduction of the limit, is stated by the Real Property Commissioners in their First Report (b). "From the increased frequency with which real property changes hands in modern times, the length of abstracts is a growing evil, which calls loudly for a remedy." If this was true in 1829, the date

(u) 9 Jarm. Conv. 47; 1 Byth. & Jarm. by Sweet, 60.

(x) 1 Hayes Conv. 284.

(y) *Ibid.* n. (z).

(z) *Roe d. Sheers v. Jeffery*, 7 T. R. 589.

(a) 1 Hayes Conv. 290, 291.

(b) Page 41.

of the report, *à fortiori* is it true in 1876. Again, it is laid down by Mr. Jarman (*c*), that "sixty years may or may not be a sufficient root of title, according to circumstances; but no circumstance can render a shorter title marketable" (*d*). It is assuredly a "circumstance of convenience" that "a shorter title" than sixty years *should* be "marketable." The substitution of a forty years' title for a sixty years' title will, accordingly, be attended with the double advantage of mitigating that "growing evil," the "length of abstracts," and of rendering a "shorter title" than sixty years, in many cases, "marketable." Mr. Hayes ridiculed the idea of the courts of equity stepping in and altering the limit of sixty years (*e*). He thought (*f*) that "the judicature, with wounds yet unclosed, might well dread" "a struggle with the stubborn practice of conveyancers." "The rule," he contended, "cannot be altered without the further interference of the legislature" (*g*). The legislature has, at length, interposed its supreme authority, and, without a shadow of opposition, achieved, by the first section of the act, now under discussion, the much-desiderated reform.

The alteration in "the period of commencement of title which a purchaser may require," is subject to two important qualifications.

The first section contains an important proviso, that "earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required." This proviso forms an important guarantee to the unrestricted purchaser. Mr. Hayes thus summarizes the cases in which "a purchaser can require evidence of title to be shown for more than sixty years" (*h*). "The abstract must show such dealings or facts commencing sixty years ago, and continued down to the present time as lead morally to the conclusion that the fee is

(*c*) 9 Jarm. Conv. 417, n., and 1 Byth. & Jarm. by Sweet, 60, n. (*i*).

(*d*) And see also Report of Land Transfer Commission, 1869, xi.

(*e*) 1 Hayes Conv. 292.

(*f*) *Ibid.* 291, 292.

(*g*) *Ibid.* 290.

(*h*) *Ibid.* 571.

now in the vendor, or in his power. If a reference discloses something beyond sixty years, which negatives or materially weakens that conclusion, then the matter referred to is necessary to complete the evidence required by the rule." Mr. Hayes, however, stoutly contended that the purchaser's right, in the last-named case, is limited to calling for the production of the documents more than sixty years old, that he may see that the title deduced is not prejudicially affected by them; but that the purchaser has no right to call upon the vendor to abstract them (*i*). "The length of title demanded by the rule seems to be the proper measure of the abstract." Applying these observations of Mr. Hayes to the new enactment, it is clear that the substitution of forty for sixty years must lead to a shortening of "the length of abstracts" (*k*).

Lord St. Leonards mentions several instances in which an unrestricted purchaser may demand the production of a title extending back farther than sixty years:—

"For instance, if it might reasonably be presumed from the contents of the abstract, that estates tail were subsisting, the purchaser might demand the production of the prior title. And the like demand may still be made, regard being had to the new time of limitation." And again:—"Where an abstract begins with a recovery to bar an entail, it is usual in practice to call for the deed creating the entail, in order to see that the estate tail and remainders over, if any, were effectually barred."

Upon this last instance it may not be out of place to observe that the new period of forty years will carry us back only to a period subsequent to the Fines and Recoveries Act, and, therefore, no abstract of title will, in future, commence with these old forms of assurance.

Lord St. Leonards lays down the general principle as to the purchaser's right to the production of an earlier title, in terms very similar to those used by Mr. Hayes:—"In every case where the statement in the abstract, or its silence, leads to a fair inference that the prior title may disclose an existing defect, the purchaser may require it to be produced."

(*i*) 1 Hayes's Conv. 574, n. (*k*).

(*k*) Vendors and Purchasers, 366, 14th ed.

The other qualification contained in the first section is as follows:—"Subject to any stipulation to the contrary in the contract." As the contract is almost always drawn up in the interest of the vendor, it is very unlikely that any stipulation shutting out the new rules will be inserted in the agreement, or in the conditions of sale. The stipulations will generally be framed with a view to restricting the rights of the purchaser. Hitherto, it has been usual for the vendor to guard against the liability to produce an earlier title than forty, thirty, or even twenty years, by some such restrictive condition of sale as this (*l*):—

"The title shall commence with ———, dated, &c., and the purchaser shall not require the production of, or investigate, or make any objection, or requisition, in respect of the prior title, whether such prior title appear by recital, statement, covenant for production or otherwise, or do not appear at all."

The Land Transfer Commissioners (*m*) came to the conclusion that "the average of titles do not extend further back than thirty years at most." The "normal length of titles ranges between twenty and forty years." "Some say that it is common to sell lands with less than a twenty years' title." An analysis of the answers of several leading firms of solicitors in town and country to the questions of the Commissioners shows that under conditions of sale purchasers will take almost any title they can get (*n*). "Owing," says Mr. Anstie (*o*), "to the practice of selling under conditions, which has universally prevailed for several years, purchasers have to take titles of any degrees of shortness and infirmity." Mr. Parson fixes twenty-five years as the usual title "under conditions of sale" (*p*). The Leeds Law Society state that "a stipulation that the vendor will give only a twenty or

(*l*) 1 Davids. Conv., 546, 2nd ed.; 538, 3rd ed.

(*m*) Report, p. 20; and see Messrs. Slater & Heelis's Answers, Appendix, p. 73. Answer to Q. 30.

(*n*) See especially Answers of Mr. Ravenhill and Mr. Ouvry, Appendix, pp. 53, 62.

(*o*) Of the firm of Vizard, Crowder, Anstie & Young, London. See Appendix to Land Transfer Commissioners' Report, p. 53.

(*p*) Appendix to Report of Land Transfer Commissioners, p. 75.

thirty years' title is found not to prejudice the sale" (q). Messrs. Lamb, Brooks & Challis say (r) that "a twenty or thirty years' title is generally accepted, if good for that period." Mr. J. C. Gant (s) states, that "most purchasers would be content with a twenty years' title." "I have sold land of my own by private contract, with the stipulation that the conveyance of my vendor should be sufficient, such vendor having purchased within ten years of the sale to me." Mr. Anstie says further (t), "I have had cases in which the title was cut down to ten years and even less. I have myself sold under conditions practically limiting the purchaser to five years' title." Mr. H. T. Young says (u), "I have conveyed, on small sales, *without any title*." The fact is, as Mr. Ouvry points out, "In small matters conditions of sale, however stringent, do not deter purchasers. In the country titles are generally pretty well known; and when the solicitors and auctioneers are men of character, the public relies on them rather than on conditions, which they probably do not read and certainly would not understand" (x).

Before passing to the next section, attention should be called to the fact, that the new rule applies only to "a contract of sale of land" (y). The new rule does not apply to mortgages of land, nor to the sale of incorporeal hereditaments (z). There is no definition of the word "land" in the new act; but it would probably be held to include all corporeal hereditaments of whatsoever tenure.

(q) *Ibid.* p. 52.

(r) Page 59.

(s) Page 67.

(t) Page 53.

(u) Page 74.

(x) Page 62.

(y) *Solicitors' Journal*, April 25th, 1874, vol. xviii. No. 26, p. 464. "It is to be noted that the provision is restricted to sales of land, and does not extend to mortgages."

(z) *Solicitors' Journal*, May 16th, 1874, vol. xviii. No. 29, p. 526.

SECTION 2.

Rules for regulating Obligations and Rights of Vendor and Purchaser.

In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say—

The words, “any such contract as aforesaid,” refer to the first section, and limit the operation of this section to “any contract of sale of land made after the 31st day of December, 1874.” Mr. Dart observes: “It is conceived that the rules laid down by sect. 2 could not be held to apply to a case in which an option to purchase or right of pre-emption has been created before the 31st December, 1874, and is exercised, so as to perfect the contract, at a later date.”

Conditions of sale and agreements for sale are prepared in the interest of the vendor, and designed to relieve him of obligations, which would otherwise be cast upon him, or to confer upon him rights, which he would not otherwise enjoy. From these obligations the vendor is invariably relieved and these rights are invariably conferred upon him, by all well-drawn conditions of sale or agreements for sale. The “rules” set out in this section are consequently “common form;” and so necessary has the insertion, *e.g.*, of the first “rule” become, that “an auctioneer (and *à fortiori* a solicitor) who omits it,” cannot recover any compensation for his services (*a*). The effect, then, of the second section of the act is to incorporate these “rules” in every “contract of sale of land made after the 31st December, 1874,” “subject to any stipulation to the contrary.” The common forms embodying the five rules will, in future, it may be presumed, be omitted from conditions of sale and agreements for sale of land, which will be proportionably shortened. The law, which the “rules” were intended to supersede and guard against, is itself repealed by this section, and the “rules” substi-

(a) 1 Davidson's Conveyancing, 479, 2nd ed., citing *Denen v. Daverell*, 3 Camp., 451.

tuted for it. It is highly improbable that any vendor will seek to restore the old law in the purchaser's favour (*b*).

RULE 1. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

This is a very salutary amendment of the law. The obligation which the law has hitherto cast upon the vendor of leaseholds is thus stated by a high authority (*c*):—"There is in every contract for sale of a lease (except a lease from an ecclesiastical corporation) an implied undertaking to make out the lessor's title to demise, as well as the lessee's title to the lease itself, it being now firmly settled, both at law (*d*) and in equity (*e*), that a seller of a leasehold cannot make a good title unless he can produce the lessor's title (*f*). If a vendor cannot produce the lessor's title, the purchaser may recover his deposit with interest (*g*), and the expense of investigating the title (*h*), and, also, any other damages which he could recover in the case of a common defective title (*i*). The stringent obligation was found to be a great obstacle to the transfer of leaseholds, as it

(*b*) This sentence has been changed from an interrogatory into an affirmation. The interrogatory was evidently equivalent to an affirmation; but to appreciate the extraordinary manner in which a critic may misconceive the plain meaning of a sentence, the reader may turn to the letter of "Scrutator" in the *Law Times*, vol. 58, p. 170.

(*c*) 1 Davidson's Conveyancing, 478, 2nd ed.; 477, 3rd ed.

(*d*) *Souter v. Drake*, 5 B. & Ad., 992; *George v. Pritchard*, 1 Moo. & Ry., 417; *Hall v. Betty*, 4 Man. & Gr., 410; 5 Sco. N. R., 508.

(*e*) *Purvis v. Rayer*, 9 Pri., 488, 522; *Clive v. Beaumont*, 1 De G. & S., 397, 406; *Gaston v. Franklin*, 2 De G. & S., 561; *Smith v. Capron*, 7 Ha., 185.

(*f*) *Fenelly v. Anderson*, 4 Ir. Jur. (Ir. Ch.), 33; *Wright v. Griffith*, Ir. Ch. Rep., 695; *Simpson v. Sadd*, 3 Eq. Rep., 263; Sugden's V. & P., 267, 268, 14th ed., and Dart's V. & P., 269.

(*g*) Bythewood & Jarman's Conveyancing, by Sweet, 74.

(*h*) *Hanslip v. Padwick*, 5 Ex., 615.

(*i*) See, as to these damages, *Hanslip v. Padwick*, 5 Ex., 615; *Hodges v. The Earl of Lichfield*, 1 Bing. N. C., 492.

was "hardly ever in a vendor's power" (*k*) to fulfil it. To negative a purchaser's right to the production of the lessor's title, therefore, was the first duty cast upon the solicitor and his counsel on a sale of leaseholds (*l*), when preparing the conditions of or agreement for sale. When no solicitor was employed a similar duty devolved upon the auctioneer.

"A practice," said Lord Ellenborough, "in the case of *Denew v. Daverell* (*m*), has very properly sprung up among auctioneers, in selling leasehold property, to insert a clause in the particulars of sale that the vendor shall not be called upon to show the title of the lessor. The plaintiff" (an auctioneer, employed to sell a leasehold house in Grosvenor Street) "was bound to take notice of that practice, and to insert such a clause in the particulars of sale of the defendant's house."

It will be perceived that the paragraph of the second section of the new act, which abrogates the old law, applies to a "grant" as well as to an "assignment" of a term of years. The reason of this is, that in the cases of *Roper v. Coombes* (*n*) and *Stranks v. St. John* (*o*), it was held that there is no difference between an agreement to grant a lease and an agreement to assign a lease, as regards the liability to show a good title in the lessor. In the case of *Stranks v. St. John*, Mr. Herschell endeavoured to establish that there was a difference between the two kinds of agreement, as regarded this liability. The court admitted the force of his argument, but considered itself bound by the authority of the case of *Roper v. Coombes*.

The only other point that seems to call for notice with respect to the new "rule" is, that the "rule" only bars the purchaser's right "to call for the title to the freehold." Suppose a term for sixty years be granted by the holder of a lease for ninety-nine years, the sub-lessee will still be entitled to call for the title to the ninety-nine years' lease during the period that has intervened since it was granted. In the case of an assignment of a lease, the assignee will still be entitled to call for the title to the

(*k*) 1 Davids. Conveyancing, 479.

(*l*) Dart's Vendors and Purchasers, 167, 5th ed.

(*m*) 3 Camp., 451 (1813).

(*n*) 6 B. & C., 534 (1827).

(*o*) 3 L. R., C. P., 376 (1867).

lease since it was granted (*p*), subject, of course, to the provisions of the first section of this act. The loss of mesne assignments is not often of serious consequence (*q*). "To make a title," said Lord Eldon (*r*), "to the residue of an old term, mesne assignments, which cannot be produced, will be presumed even in law." No difficulty is, therefore, likely to arise from the restriction of the new rule to the "title to the freehold." If, however, it is intended, on the sale of a term "derived out of a leasehold estate," that the title of the sub-lessor shall not be inquired into, the right of the sub-lessee to call for the sub-lessor's title (*s*) must still be expressly negatived in the conditions of or agreement for sale; and if the transaction be an assignment, and it is desired that the title of the assignor of the term shall not be inquired into, the right of the assignee to call for the assignor's title must still be similarly negatived. Special conditions of sale, negativing the purchaser's right to the production of mesne assignments and the title prior to the underlease, will be found in the first volume of Mr. Davidson's learned work (*t*).

Since the above was written, Mr. Dart, in the new edition of his "Treatise on the Law of Vendors and Purchasers," has made the following remarks:—"According to this rule, the purchaser of an underlease may, in the absence of express stipulation, 'call for' the title of his sub-lessor; nor, it is conceived, is such purchaser, or a *purchaser of the original lease*, precluded by this rule from making any objection or requisition not involving an actual production, in respect of the freeholder's title, or from requiring proof of his right to grant the lease. 'To call for the title' would seem naturally to mean, 'to call for its production, or to require it to be deduced;' but even if the rule could be construed as precluding the right to make any requisition in

(*p*) "If the purchaser of a lease is not entitled to the lessor's title, he, of course, can only require a regular title to the leasehold interest from the time the lease was granted. Sugd. V. & P., 370, 14th ed.

(*q*) Sugden's V. & P., 370, 14th ed.

(*r*) In *White v. Foljambe*, 11 Ves., 350.

(*s*) See Dart's V. & P., 167, 5th ed.

(*t*) 1 Davids. Conv., 564, 2nd ed.; 555, 3rd ed.; 610, 611 (616, 617), &c.

respect of the title, it is still less comprehensive than the condition in ordinary use, which, when it is in the form that the lessor's title shall not be inquired into, may preclude an objection taken *aliunde*" (u).

It is much to be regretted that there is so strong a tendency, on the part of eminent text writers, to whittle away the force and effect of acts of parliament, or to brush them contemptuously aside, instead of endeavouring to give as beneficial an operation as possible to the intentions of the legislature, in the interest of the public. It was the narrowness of view of the courts of common law which gave birth to the equitable jurisdiction; it is surely undesirable that a similar narrowness of view should prevail in the interpretation of statutes like the present one, intended to be administered by the Chancery Division. How can the lessor's title (in the absence of any stipulation) be "*inquired into*" by "a purchaser of the original lease," when the present enactment expressly declares that the lessor's title shall not be "*called for*?" The entrance of such a purchaser into this field of inquiry is distinctly barred, it is submitted, by the present enactment.

RULE 2. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, acts of parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

The rule here stated is a common form (x) in conditions of sale and agreements for sale, and indeed is now so usual as not to prejudice a sale, although, if a shorter period than "twenty years" were fixed, it probably might (y). Hitherto, in the absence of an express stipulation on the point, a recital of statement in any document has been evidence of the fact only as

(u) Dart's V. & P. 167, 168, 5th ed.

(x) See, e. g., 1 Davids. Conveyancing, 547, 556, 565, 571, 2nd ed., for these common forms.

(y) 1 Davids. Conv., 491.

against the parties to the document and those who claimed under them (z). The hardships inflicted by the old law are well illustrated by the case of *Fort v. Clarke*, decided in 1826. A testator, in 1732, nearly 100 years before the suit, devised his estate to his wife for life; with remainder to his son John for life; with remainder to John's first and other sons in tail male; with remainder to John's daughters in tail general; with remainder to his own right heirs; and he died not long afterwards. A mortgagee was let into possession in 1750, three years after the death of the testator's widow. In 1793, the heirs of the bodies of the daughters of John, or two persons in an humble station of life in Bermuda, claiming to be such heirs, by deeds of lease and release, reciting the devolution of title to them under the will, in consequence of the death of the sons of John without issue, and by a fine and common recovery, conveyed the estate to one B. in fee. B. obtained an assignment of the mortgage term from the personal representatives of the mortgagee. The possession had remained unchallenged and undisturbed for thirty-three years in B. and those claiming under him. The Master, on a reference in a suit for specific performance, instituted by the vendor of the estate (claiming under B.), certified against the title, and Lord Gifford, M. R., overruled the vendor's exception to the Master's report. Mr. Sugden (Lord St. Leonards) argued, on the vendor's behalf, that the recitals in the deeds of 1793, which set forth the pedigree of the heirs of the bodies of the daughters of John, coupled with the subsequent uninterrupted enjoyment of B. and those claiming under him, were sufficient to enable the court to presume that the persons who claimed in 1793 to fill the character of heirs of the bodies of the daughters of John were entitled to do so. Moreover, the personal representative of the mortgagee would surely not have parted with his legal interest to B., unless perfectly satisfied that B. had a right to compel a conveyance. The fact of a mortgagee having been in possession between 1750 and 1793 accounted for the want of possession of the family of the testator during that interval. The persons entitled to the equity of redemption were seafaring men resident

(z) *Fort v. Clarke*, 1 Russ., 601.

in a remote island, and therefore ill-fitted to struggle with the difficulties which they were likely to encounter in attempting to recover their family inheritance. Lord Gifford, M. R., said: "It has been contended that the recitals in the deeds of 1793 ought to be received as sufficient evidence of the pedigree of the parties who then conveyed to B. These recitals cannot, as against third parties, be any evidence of the pedigree" (a). The estate was consequently unmarketable; and it is difficult to see how title could ever be made to it, as no amount of time could make the recitals in the deeds of 1793 more reliable than they were in 1826.

It will be perceived that the new rule is subject to this qualification, that the "recitals, statements and descriptions" may be "proved to be inaccurate," and in that case they shall *not* be "taken to be sufficient evidence." Mr. Dart has pointed out (b), that the common condition as to recitals being evidence would not "seem to preclude the purchaser from proving *aliunde* the inaccuracy of the recitals as to matters of fact." One of the conditions of sale, in the case of *Drysdale v. Mace* (c), was to the effect that a statement in a deed of the year 1839 (the sale occurring in 1854), that a life annuity granted to A. B. has not been paid or claimed for eight years, should be "conclusive evidence" that the annuity had determined. The purchaser's solicitor ascertained from sources other than the abstract of title, that the annuity referred to in the conditions of sale was payable during four lives and the life of the survivor, and that two, at least, of the lives were in existence. The court held that the purchaser was not bound by the condition of sale, on account of the inaccuracy of the description of the annuity as a "life annuity." "If an annuity is described to a purchaser as a life annuity granted to a specified person, the purchaser cannot collect," said Lord Justice Turner, "from such a description that the annuity was granted for four lives. . . The terms used were calculated to lead the purchaser to believe that the annuity was only for one life." The new rule, therefore, follows the construction put upon the common form of condition by the

(a) 1 Russ., 604.

(b) Vendors and Purchasers, 147, 148, 5th ed.

(c) 5 De Gex, M. & G., 103.

Court of Chancery; and without such a qualification as that which it contains—"unless and except so far as the recitals, &c. shall be proved to be inaccurate"—the new rule would be calculated to mislead a vendor. The Court of Chancery would have put the same construction on the new rule, in the absence of the qualification, as they had previously put upon the common form. Such a qualification, it may be observed, would not have prevented the new rule, if in force in 1826, from curing the defect in the title of the vendor in the case of *Fort v. Clarke*, as no attempt was made by the purchaser in that case to show that the pedigree was "inaccurate," and the recital was more than "twenty years old."

If the statement in the case of *Fort v. Clarke* had been simply that the persons purporting to be heirs of the body of the daughters of John were so, without setting out any pedigree, this, being a conclusion of *law*, would not have been covered by the new rule, which is confined expressly to matters of fact (*d*). "A mere recital that J. S. was the heir-at-law of E. T. is something more than a matter of pedigree, being a conclusion of law" (*e*). If it is intended that recitals, &c. of conclusions of law shall be evidence, an express stipulation to that effect must be inserted in the conditions of sale (*f*). The common condition, like the new rule which follows it, is confined to matters of fact. It is almost superfluous to point out that the new rule will save expense in searching for evidence of the facts on which titles depend. The value of "statutory declarations" (to which it extends) will also be enhanced by it.

Mr. Dart observes (*g*), that "in particular cases it may frequently, with a view to the present practice, in framing conditions of sale, of making recitals evidence, be expedient to introduce

(*d*) See 9 Byth. & Jarm. Conv., by Sweet, 4; Dart's V. & P., 147, 148, 5th ed.

(*e*) 9 Byth. & Jarm. Conv., by Sweet, *ubi supra*.

(*f*) E. g., "Every recital, &c., whether stated as a matter of fact or as a conclusion of law, shall be deemed conclusive evidence of the fact or conclusion so stated."

(*g*) Dart's V. & P., 519, 5th ed. Mr. Dart, in another place (p. 148), has this discouraging remark, "This rule is less comprehensive than, and, in practice, is not likely to supersede, the ordinary condition."

into conveyances statements of facts, which may tend to validate the title, although they may be inconsistent with the strict logical unity of the draft." This observation receives additional force, now that the common form of condition has been incorporated in the statute book and become part of the law of the land.

RULE 3. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

This and the following paragraph relate to the same subject-matter,—covenants for the production of title deeds.

This new rule practically destroys the effect of the decision of Sir John Leach in the well-known case of *Barclay v. Raine* (*h*), and the effect of which is thus stated by Lord St. Leonards (*i*), who argued the case on behalf of the purchaser:—"A purchaser is not bound to rely upon an equitable right to compel the production of the deeds, but is entitled to the deeds, or a valid" (*i. e.* legal) "covenant to produce them." "The point actually decided," says another authority (*k*), "in *Barclay v. Raine* was, that even where it is clear that the equitable right to call for the production of deeds exists, a purchaser is not compellable to rely upon it, but is entitled to a covenant for the production of all deeds material to the title, which are not placed in his possession; and the circumstance that he cannot have either the deeds or such a covenant, affords a sufficient ground for resisting the performance of the contract."

The new rule is in accordance with the practice of conveyances, as stated by Mr. Davidson (*l*). "Such a covenant for the production of deeds as will run with the land can seldom be had,

(*h*) 1 Sim. & Stu., 449.

(*i*) Vendors and Purchasers, 452, 14th ed.

(*k*) 9 Byth. & Jarm., by Sweet, 98, 99.

(*l*) 1 Davids. Conv., 540, 2nd ed.; 534, 3rd ed.

and therefore, relying on the equitable right to production, the want of such a covenant is seldom made an objection to the title on behalf of a willing purchaser. Indeed, it is the opinion of a large portion of the profession, that the want of such a covenant is in no case a valid objection to the title."

Mr. Dart enumerates (*m*) amongst those (*n*), who "have an equitable right to the production of such documents," the following:—"The owner of an undivided share may in equity compel the owner of any of the other undivided shares who holds the deeds relating to the common title to produce them" (*o*). "Where estates are held in severalty under separate titles created by a single instrument, as in the case of a settlement, exchange or partition (*p*), the owner for the time being of any one such estate may enforce production of such instrument." "Where an estate is in settlement the legal tenant for life is entitled to the custody of the title deeds (*q*); but, if wanted for a proper course, then production can be enforced by a vested remainderman, or by a purchaser from him" (*r*). "A mortgagee who consents to a sale by the court must bring the deeds into court" (*s*). A "legal covenant" is a covenant so framed as to run with the land (*t*). This rule does not relieve the vendor from his liability, in the absence of stipulation, to produce the deeds *for comparison* with the abstract (*u*).

The common form of condition of sale provides as follows:—

"The purchaser shall not make any objection on the ground of any existing covenant for the production of muniments of title being invalid, or insufficient, or not running with the land;

(*m*) Vendors and Purchasers, 409—414, 5th ed.

(*n*) There are other cases, but they are not quite so clear.

(*o*) See 2 Meriv., 490; *Burton v. Neville*, 2 Cox, 242.

(*p*) *Lord Banbury v. Briscoe*, 2 Ch. Ca., 42; Sugd., 442.

(*q*) *Garner v. Hannington*, 22 Beav., 444.

(*r*) *Lord Lempster v. Lord Pomfret*, 1 Dick., 238; *Davis v. Lord Dysart*, 20 Beav., 405; 21 Beav., 12.

(*s*) *Livesey v. Harding*, 1 Beav., 343.

(*t*) Dart's V. & P., 143, 5th ed. Mr. Dart seems puzzled by the phrase "equitable right to production;" but he himself explains it, c. ix., s. 2, cited in the text.

(*u*) *Ib.*, 407. At p. 282, "cost" is a typographical error for "covenant" (covt.).

nor require any other covenant for the production of such muniments, nor make any objection on account of the absence thereof, but shall be satisfied in all respects with such existing covenant" (v).

RULE 4. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

In the absence of a stipulation to the contrary, a purchaser is entitled to be furnished at the vendor's expense (if he cannot have the deeds themselves) with an attested copy of every document material to the proof of a sixty years' title, except instruments on record, and with a covenant for the production, at his own expense, of the originals (x).

In consequence of the vendor's liability with respect to furnishing attested copies and covenants for the production of deeds, it should be stipulated, whenever property is sold in lots, that the expense of attested and other copies shall be borne by the purchaser requiring the same, for otherwise the vendor may be put to a ruinous expense. Indeed, in all cases in which attested copies *can* be required, it is better to stipulate that they shall be furnished at the cost of the purchaser; a condition to this effect always reduces the attested copies which are called for to a very small number, and often renders the purchaser satisfied to dispense with them altogether. The condition should extend to copies required for the verification of the abstract; [for] a condition requiring the purchaser to pay for the expense of attested and office copies does not apply to those which are required for

(v) See Davidson on Conveyancing, vol. i., pp. 548, 558, 566, 572, 2nd ed.; pp. 540, 549, 557, 562, 3rd ed.

(x) 1 Davids. Conv., 539, 2nd ed.; 533, 3rd ed.; Sugd. V. & P., 450, 14th ed.; 9 Jarm. Conv., 98, n.; *Barclay v. Raine*, 1 S. & S., 449.

the verification of the abstract, unless expressly extended to them (y).

Mr. Dart (z) thus explains the law prior to this enactment:—
 “The purchaser, as respects deeds of which he could claim attested copies at the vendor's expense, was also entitled (at the like expense) to a covenant for the production of the originals, and also to a covenant for the production of such copies of court roll and instruments of record as were in the vendor's possession or power; but the expenses of future production were borne by the purchaser.”

When the bill, on which the section now under discussion is founded, was originally introduced into the House of Lords, it contained a sub-section relating to the expense of attested and other copies, embodying the common form of condition of sale on the subject, and the Lord Chancellor referred to this sub-section in his opening speech (a):—

“In all cases in which a purchaser shall require, either for the purpose of verifying the abstract or of accompanying or completing the title or otherwise, an abstract, or the production of any deed, court roll, or document, not in the possession of the vendor, or any office, attested, or other copy of, or extract from, any deed, court roll, or document, whether in such possession or not, or any statutory declaration, or certificate, or other evidence, not in the vendor's possession, he shall bear the expense of complying, or endeavouring to comply, with every such requisition, and of all searches, inquiries and journeys in relation thereto.”

This sub-section, embodying the common form, stood as the 4th paragraph in the 2nd section; but on the report it disappeared from the bill. It certainly goes far beyond the condition not unfrequently inserted in agreements for sale, which provides that the purchaser shall only bear *half* the expense of attested copies, and that the vendor shall bear the other half. While, however, the sub-section throwing on the purchaser (and on him exclusively) the expense of attested and other copies was struck out,

(y) 1 Davids. Conv., 490, 541, 2nd ed.; 489, 535, 3rd ed.

(z) Dart's V. & P., 677, 5th ed.

(a) Hansard's Parliamentary Debates, Third Series, vol. ccxviii. 329.

the sub-section throwing the expense of covenants for production on the purchaser (except the expense of perusal and execution on behalf of and by the vendor, and on behalf of and by necessary parties other than the purchaser) (*b*), was retained. The common form usually runs thus:

"The vendor shall retain all such muniments of title as relate to other property not included in the sale, and enter into the usual covenants for the production thereof, such covenants to be prepared at the expense of the purchaser" (*c*).

RULE 5. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

"If part only of the estate is sold, the vendor," says Mr. Davidson, "almost always stipulates that he will retain the deeds." The common form is (as already stated under the last sub-section), "The vendor shall retain such muniments of title as relate to other property not included in the sale" (*d*).

Mr. Dart suggested the rule now adopted by the legislature as the sounder view, in his fourth edition (*e*).

SECTION 3.

Trustees may sell, &c. notwithstanding Rules.

Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this act.

Trustees are "not, without special authority, justified in selling under conditions unnecessarily restrictive of the purchaser's right to a marketable title, or any depreciatory special condi-

(*b*) "The vendor is [very frequently] relieved [by the conditions of sale] from all other expenses than those of making the abstract and *perusing and executing* the conveyance; 1 Davids. Conv., 490, 2nd ed.

(*c*) 1 Davids. Conv., 551, 560, 568, 574, 2nd ed.; 544, 552, 558, 564, 3rd ed.

(*d*) 1 Davids. Conv., 539, 2nd ed.; 544, 3rd ed.

(*e*) Dart's V. & P., 618, 4th ed.; 674, 5th ed.

tions; and it is by no means clear that, under such circumstances, they can make a title which a purchaser can be advised to accept" (*f*). It was even, at one time, held (*g*), that "a trustee simply authorized to sell by public auction, either generally or for a specified sum, could not, whatever price was offered, sell by private contract." But this doctrine has been somewhat shaken by recent decisions (*h*). Trustees, also, cannot, "unless specially authorized to do so, safely buy subject to special conditions restrictive of a purchaser's *primâ facie* right to a marketable title or the usual evidence of title; nor accept a title not strictly marketable." But this doctrine, too, must be taken with certain allowances (*i*).

As, however, "the tendency of recent decisions and the recent practice of the Court [of Chancery] is towards an increased rather than a diminished particularity in investigating titles" (*k*), the section now under discussion is calculated to give confidence to fiduciary vendors and purchasers. They need not "stipulate" to "exclude the application of the 2nd section." The law, of course, remains unaltered, that "a trustee is not justified in investing on the security of leaseholds unless he have an *express power* to do so" (*l*).

SECTION 4.

Legal Personal Representative may convey Legal Estate of Mortgaged Property.

The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mort-

(*f*) Dart's V. & P., 73, 5th ed.

(*g*) *Daniel v. Adams*, Amb., 495; *In re Loft*, 8 Jur., 206.

(*h*) *Else v. Barnard*, 28 Beav., 228; *Bousfield v. Hodges*, 33 Beav., 90; Dart's V. & P., 65, 5th ed.

(*i*) *Re Sheffield & R. R. Co.*, 1 Sm. & G., App. iv., and Dart's V. & P., 89, 5th ed.

(*k*) Dart's V. & P., 90, 5th ed.

(*l*) See *Wyatt v. Sherratt*, 3 Beav., 498; 3 Davids. Conv., part 1, p. 36, 3rd ed.

gage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.

"After the day fixed for the payment of the money has passed, the mortgagee, in a court of law, is absolutely entitled; and the estate mortgaged may be devised by his will (*m*), or, if he should die intestate, will descend to his heir-at-law; but in equity he has a security only for the payment of the money, the right to which will, in common with his other personal estate, devolve on his executors or administrators, for whom his devisee or heir will be a trustee; and when [his executors or administrators] are paid, such devisee or heir will be obliged by the Court of Chancery, without receiving a sixpence for himself, to re-convey the estate to the mortgagor" (*n*). In consequence of the mortgaged estate devolving on the heir, the executor, if he file a bill to foreclose, must make the heir a party, because the heir will be a necessary party to the re-conveyance, if the mortgagor redeems (*o*). It was considered so important that the heir should be a party to the suit, that where the heir of a mortgagee could not be found, the executor of the mortgagee was restrained from proceeding at law to obtain payment of the mortgage money, and the money was ordered into court until the heir could be found; after the cause had remained some years in court, it was thought worth while to get an act of parliament to revest the estate, on an allegation that the heir could not be found (*p*).

This section is merely *permissive*—"the legal personal representative *may* convey or surrender the mortgaged estate."

Suppose a mortgagor has repaid the mortgage debt with interest, and the mortgagee dies before he has reconveyed the mortgaged property, leaving an heir only a few years old, or, it may

(*m*) See 1 Jarm. Wills, 638 (654, 3rd ed.).

(*n*) Joshua Williams on Real Property, 10th ed., p. 411 (London, Sweet, 1873).

(*o*) *Wood v. Williams*, 4 Madd., 186.

(*p*) *Schoole v. Sale*, 1 Sch. & Lef., 177. Mr. Daniell (1 Ch. Pract. 175) says that the difficulty is now met by the 13 & 14 Vict. c. 60, s. 19, but he forgets that that enactment involves the expensive process of applying to the Court of Chancery.

be, *en ventre sa mère*, the legal estate cannot be got in until the infant heir of the mortgagee attains his majority (*q*). Now it is quite true that "an infant, how young soever he be (*r*), and even a child *en ventre sa mère* (*s*), may be appointed executor (*t*); but, by the statute 38 Geo. 3, c. 87, he is altogether disqualified from *exercising* his office," till he is twenty-one. In case of intestacy, "if the next of kin be a minor, administration must be granted to another person during his minority." "A minor cannot take upon himself the liabilities which the law casts upon an administrator: for instance, he cannot execute the bond" (*u*).

The result of this state of the law is, that infants are never appointed executors or administrators. The "legal personal representative" is always an adult; and, hence, the section now under discussion, and the following section, will, it is to be hoped, remedy the difficulties which arise from an infant heir.

It will be seen, that this section speaks only of a copyhold estate "to which the mortgagee shall have been admitted." If a mortgagee of copyholds have not been admitted, and the mortgage is paid off, it is the practice to enter an acknowledgment of satisfaction on the court rolls, which is treated as sufficient evidence of the discharge of the mortgage, and as vacating the surrender (*x*).

Under circumstances similar to those mentioned in *Angier v. Stannard* (*y*), the mortgagee would, it is apprehended, be a "bare trustee" of the hereditaments included in the mortgage for the mortgagor; and the hereditaments would, on his death before conveyance, "vest like a chattel real," in his "legal personal representative," under section 5, independently of

(*q*) *In re Skitter*, 4 W. R., 791, an order was made vesting the legal estate in the mortgage property in the executor of the mortgagee when the heir was out of the jurisdiction.

(*r*) Went. Off. Ex., c. 18, p. 390, 14th ed.; Swinb., pt. 5, s. 1, pl. 6.

(*s*) Godolph., pt. 2, c. 9, s. 1.

(*t*) Williams on Executors (b. 1, pt. 3, c. 1), p. 231, 7th ed.

(*u*) Per Cresswell, J., *In the goods of the Duchess of Orleans*, 1 Sw. & Tr., 253; Williams on Executors (b. 1, pt. 13, c. 1), p. 450.

(*x*) 2 Davidson's Conv., part 2, p. 667 (3rd ed.).

(*y*) 3 Myl. & K., 566.

section 4. A transfer, under this section, by an administratrix, who is a married woman, would require acknowledgment (x), because there is nothing here to take the case out of the Fines and Recoveries Act; but if the administratrix were a "bare trustee" of the legal estate for the mortgagor, she could convey or surrender the estate to the mortgagor under section 6, "as if she were a *feme sole*." It seems, however, at least doubtful whether this section was intended to apply to *transfers* of mortgages at all. The expression "on payment of all sums secured by the mortgage," seems to point to the payment off of the *mortgage debt* by the mortgagor, so that nothing is left in the mortgagee's representative but the dry legal estate. The mortgage debt continues, notwithstanding a transfer. Not merely the "hereditaments" are transferred, but the mortgage debt, and the covenants and powers which form a supplemental security for the mortgage debt, are transferred also. So long as the transaction *continues to be a mortgage*, the section, it is apprehended, does not apply. Otherwise many difficulties might arise (a).

(x) *Law Times*, vol. lvii., Nos. 1646 and 1647, pp. 417, 436.

(a) "Section 4—which seems not confined to mortgagees dying after the act—gives the legal personal representative of a deceased mortgagee of freehold or copyhold estates power to pass the estate, but only 'on payment of all sums secured by the mortgage.'

"Thus the future title depends on questions of account and matters of fact, no satisfactory proof whereof is available, whilst yet the statute fails to make the statement in the reconveyance conclusive in favour of future alienees.

"It follows that any under-calculation of interest, ignorance of unpaid costs, or insurance secured by the mortgage, and the like, would prevent altogether the passing of the legal estate; for the section seems not to vest the fee in the executor or administrator, nor prevent it from passing by descent or devise, but merely empowers the executor or administrator to divest it and pass it in specified events.

"Then, again, what is 'payment?' *E. g.* If the executor or administrator, acting under a power of sale, sells, and thereby obtains the money secured, is *that* 'payment?'

"Even if it be, yet if, after the sale, money secured remains unpaid, the case is out of the statute. Thus, on a sale in lots,

The practical effect of this construction would, perhaps, be to narrow the scope of the section to cases which might fall under section 5; but it must be recollected that section 5 formed no part of the original bill, and may have been introduced to extend, in a bolder form, the principle underlying the 4th section to other cases besides that of the mortgagee.

SECTION 5.

Bare Legal Estate in Fee Simple to vest in Executor or Administrator.

Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest, like a chattel real, in the legal personal representative from time to time of such trustee.

This section and the next one, both of which relate to "bare trustees," were not contained in the bill, on which the act is founded, as originally introduced by Lord Cairns. They were added to the bill on the report in the Lords.

This section was repealed and re-enacted in an amended form, at the instance of the writer, by sect. 48 of the Land Transfer Act, 1875. See the note to that enactment, *infra*, as to the controversies to which this section gave rise.

The expression "bare trustee" has been recently defined by Sir Charles Hall, V. C. :—"Who is a bare trustee is a question of general practical importance. Where there is a trustee whose trust is to convey, and the time has arrived for a conveyance by him, he is, I think, a bare trustee, whether considered in reference to the Vendor and Purchaser Act, 1874, s. 5, or in reference to the Land Transfer Act, 1875, s. 48. Mr. Dart and Mr. Barber, in the 5th edition of their 'Treatise on the Law and Practice

the power to convey might depend on (1) the lots sold and prices; (2) whether all the contracts were completed; (3) time and order of completion." Mr. J. W. Hall, in the *Law Journal*, vol. ix., No. 458, October 24th, 1874.

relating to Vendors and Purchasers of Real Estate,' recently published, p. 517, have expressed their view 'that the act does not define what is meant by a bare trustee in these sections; and the term is generally understood to be ambiguous; but it will probably be held to mean a trustee to whose office no duties were originally attached; or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trustent*, be compellable in equity to convey the legal estate to them, or by their direction, and has been requested by them so to convey it.' In my opinion, the words 'has been requested by them so to convey it' are not an important or necessary ingredient to a person being a bare trustee; but, leaving out these words, I approve of the statement which I have read from their valuable work" (b).

SECTION 6.

Married Woman, who is a bare Trustee, may convey, &c.

When any freehold or copyhold hereditaments shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*.

This section will chiefly apply to cases where a woman is a "legal personal representative" as well as a "bare trustee," as it is not usual to make women trustees of instruments *inter vivos*.

Wherever, it is submitted, the Court of Chancery would compel a trustee to convey the legal estate to his *cestui que trust*, the trustee is a "bare trustee." Lord Westbury, in *Robson v. Flight* (34 L. J., Ch., 226, 227), distinguishes a "bare trust" from a trust power requiring discretion in its exercise.

The Fines and Recoveries Abolition Act (c), section 77, pro-

(b) *Christie v. Ovington*, L. R., 1 Ch. Div., 279, 281.

(c) 3 & 4 Will. 4, c. 74.

vides as follows:—"It shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*; save and except that *no such disposition, release, surrender or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed.*"

Section 79 provides that "every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided."

Section 80 provides that "such judge, master in chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender or extinguishment shall be made by her under this act, shall *examine her, apart from her husband*, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and unless she freely and voluntarily consents to such deed shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void."

The ceremony of separate examination is the only relic of the

"solemn juggling" (*d*) known to our ancestors as fines and recoveries (*e*), which Mr. Brodie, when framing the Fines and Recoveries Abolition Act, thought fit to hand down to posterity. Mr. Joshua Williams depicts this ceremony in the following flattering terms: "The present system of taking the acknowledgment [of a married woman] on a conveyance of her real estate is often found to be a burdensome expense without any practical benefit. For if a husband can persuade his wife to sign a deed, he can easily prevail on her to make an acknowledgment before two commissioners, notwithstanding that during the two minutes which the transaction lasts she may remain separate and apart from him" (*f*).

Yet "Malins' Act" (20 & 21 Vict. c. 57), when enabling a married woman to dispose of her reversionary interests in personal estate, reproduced and perpetuated the ceremony of separate examination. The really important point, both in respect of the Fines and Recoveries Act and Malins' Act is the "concurrence" of the husband in the wife's deed of conveyance. If it be withheld, the wife is powerless to pass the property alone; as, although the Fines and Recoveries Abolition Act uses the very language of the 6th section of the new act, "as if she were a *feme sole*," these words are controlled by the saving or exception which follows:—"No such disposition shall be valid, unless the husband concur in the deed by which the same shall be effected."

Where the wife is a "bare trustee," it is rather hard to throw upon the *cestui que trust* the expense and trouble of invoking the aid of the Court of Chancery to compel the husband to yield a reluctant assent to the conveyance. The husband may say, "I know that my interest in the matter is *nil*, but my consent is worth something. What will you give me for it?" The 6th clause of the new act enables the *cestui que trust* to ignore the husband altogether, and to deal with the *feme covert* as if she were a *feme sole*.

(*d*) Williams on Real Property, Part 1, Chap. 2 ("Of Estates Tail").

(*e*) Cruise on Fines, 108, 109.

(*f*) Williams on Personal Property, Part 4, Chap. 5 ("Of the Mutual Rights of Husband and Wife").

SECTION 7.

Protection and Priority by Legal Estates and Tacking not to be allowed.

After the commencement of this act no priority or protection shall be given or allowed to any estate, right or interest in land by reason of such estate, right or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice; provided always, that this section shall not take away from any estate, right, title or interest any priority or protection which, but for this section, would have been given or allowed thereto as against any estate or interest existing before the commencement of this act.

This section involved a very decided step in the direction of the fusion of law and equity. It originally formed clause 125 of the Land Transfer Bill of 1874, and its coming in force in 1874, although that bill was dropped, was due to its removal from the bill, and its insertion in the present measure in committee on recommitment in the House of Lords.

In the case of *Stainforth v. Gooding* (*Times*, April 29th, 1875) the Master of the Rolls (Sir George Jessel) gave utterance to the general feeling of the profession with regard to this section, when he observed, that "nobody had been able to understand its meaning." The section has, accordingly, been repealed by the Land Titles and Transfer Act, 1875, as from the 7th August, 1874, when it came in force; intervening transactions on the faith of it, however, being expressly protected by an amendment, inserted at the instance of the writer.

SECTION 8.

Non-registration of Will in Middlesex, &c. cured in certain Cases.

Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

The Land Transfer Commissioners recommended (*g*) that the Middlesex Registry "should be closed," as "causing a great increase of trouble and expense," and "affording no additional security or other advantage."

Mr. E. L. Rowcliffe, of the firm of Gregory, Rowcliffes & Rawle, stated in his evidence before the Commission (*h*):—"More frequently we find probates of wills or administrations have not been registered, and, of course, we have to see that all that is done; and, where the registration has been omitted, as often is the case, for fifteen or twenty years (*i*), there is a considerable trouble and expense."

Mr. William James Farrer, of the firm of Farrer, Ouvry & Company, one of the Commissioners, was also examined upon this subject, and his evidence (*j*) throws considerable light upon the motives which induced the legislature to pass this section:—"I have known cases in which the witnesses to a will had died before the necessity of registering the will had become known, so that *the will could not be registered*. I ought, perhaps, to mention that the case I have in view was an Irish one,

(*g*) Report, 1869, p. xxxvii.

(*h*) Minutes of Evidence (as to the Middlesex Registry), p. 45.

(*i*) Mr. Rowcliffe must have been thinking of Yorkshire. Five years is the utmost limit in Middlesex (*vide infra*).

(*j*) *Ubi supra*.

not a Middlesex one; but the same principle applies to Middlesex which applies to Ireland. In that case it might have happened that some subsequent claimant got his deed registered before the will was registered; and if priority on the register had given an absolute title, he would have got *an undue preference to the person claiming under the will*. For this reason I think that, while the Middlesex Registry is useless, it may possibly actually lead to injustice."

It was to remedy the "injustice" referred to by Mr. Farrer that the 8th section was passed. As Mr. Farrer pointed out, the "principle" is not confined to the Middlesex Registry; and by the 8th section, therefore, provision is made for unregistered wills in Yorkshire as well as in Middlesex. By the statute 7 Ann. c. 20, which created the Middlesex Registry, it is enacted, that "every devise by will, whereby any lands, tenements or hereditaments" in that county "may be (in) any way affected in law or equity, shall be *void* against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered within six months after the death of the deviser, or, in the case of persons dying upon the sea, or in any parts beyond the seas, within three years after the death of the deviser" (*k*). In case of the will being contested, or other inevitable difficulty, the time is enlarged (*l*) to "two years and four years after the death of the deviser," respectively: and, in case of "concealment or suppression of a will," to "five years."

By the 2 & 3 Ann. c. 4, which created the Registry for the West Riding of Yorkshire, it is enacted, that "every lease by will, whereby any lands, tenements or hereditaments in the said West Riding may be (in) any way affected in law or equity, shall be adjudged *fraudulent and void* against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered within six months after the death of the deviser, or, in the case of persons dying upon or in any parts beyond the seas, within three years after the death of the deviser." In case of the will being contested, or other

(*k*) Sections 1 and 8.

(*l*) By sections 9 and 10.

inevitable difficulty, the time is enlarged to six months after the removal of the disability (*m*). The statute 6 Ann. c. 35, contains a precisely similar enactment respecting unregistered wills in the East Riding of Yorkshire (*n*); and the statute 8 Geo. 2, c. 6, contains a precisely similar enactment respecting unregistered wills in the North Riding of Yorkshire (*o*).

The learning upon the subject of the Middlesex and Yorkshire Registries will be found in Sugden's Vendors and Purchasers (*p*). The recent cases are collected in Dart's Vendors and Purchasers (*q*).

It will be perceived, that the 8th section only applies where the assurance by the devisee under the unregistered will is registered before the assurance by the heir-at-law. The enactment only cures the want of registration of *the will*. The omission to register a will is more likely to occur than the omission to register a deed, and it is more difficult to cure.

The provisions of the acts relating to these registries have no application, even now, to land put upon the register provided by the Land Transfer Act of 1862, at least "whilst it remains thereon" (*r*), nor to land put upon the register under the Land Titles and Transfer Act, 1875.

SECTION 9.

Vendor or Purchaser may obtain Decision of Judge in Chambers as to Requisitions or Objections, or Compensation, &c.

A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect

(*m*) Sections 1, 20 and 21.

(*n*) Sections 1, 14 and 15.

(*o*) Sections 1, 15 and 16.

(*p*) Chap. 14, s. 4, pp. 727—733, 14th ed.

(*q*) Chap. 15, s. 4, pp. 852—857, 5th ed.

(*r*) 25 & 26 Vict. c. 53, s. 104.

of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

The only method, generally speaking, of obtaining the opinion of the Court of Chancery, as between vendor and purchaser, has been by way of special case, under 13 & 14 Vict. c. 35—"an apparently, rather than a really, inexpensive and easy mode" (*s*). This proceeding by special case is as formal as an ordinary suit by bill, and must, indeed, be filed as a bill is filed (*t*).

Under the statute 15 & 16 Vict. c. 80, which abolished the office of Master in Ordinary, the Master of the Rolls and the Vice-Chancellors were empowered and required "to sit at chambers for the despatch of business;" and by various statutes, passed since then (*u*), express jurisdiction has been conferred on these judges so sitting at chambers, in many important matters; and the judges, under the authority of the 26th section of the statute 15 & 16 Vict. c. 80, have, from time to time, enlarged the class of matters to be dealt with at chambers. Thus, where a fund under the control of the court is to be laid out in the purchase of an estate, if any particular point arises on the title, the parties may apply to a judge at chambers for a decision upon it (*x*); and in sales of land by the court, the conditions of sale usually provide that any error or misstatement in the particulars is not to annul the sale, but that compensation is to be made to or by the purchaser, and the amount of it is to be settled by a

(*s*) Dart's Vendors and Purchasers, p. 1018, 5th ed.

(*t*) See Daniell's Chancery Practice, 5th ed., c. xliii., "Special Case."

(*u*) 1852.

(*x*) *Ex parte The Governors of Christ's Hospital*, 2 Hem. & Mil. 166, 168; and see Daniell's Chancery Practice, p. 1119, 5th ed.

judge at chambers. Any requisitions or objections, too, by a purchaser, which, in the case of a sale by the court, the solicitor conducting the sale and the purchaser's adviser cannot satisfactorily dispose of, may be brought under the notice of a judge at chambers, and the questions in dispute may be decided by him (*y*). The 40th section of the statute 15 & 16 Vict. c. 80, empowers the judge sitting at chambers to "receive and act upon" the opinion of the conveyancing counsel to the Court of Chancery, in any of these cases. The mode of proceeding before a judge at chambers is similar to the mode of proceeding, in a summary way on motion, in court; and is, therefore, less expensive and more expeditious than the more formal method of proceeding on a special case.

The provisions of the 9th section of the new act confer upon a judge at chambers the same powers of making orders on "questions arising out of or connected with" contracts for the sale of real or leasehold estates, on the application of an ordinary vendor or purchaser, as are now possessed by a judge at chambers, in the case of a sale by the Court of Chancery, or of the purchase of an estate out of funds under the control of that court; with this qualification, that the questions must not "affect the existence or validity of the contract" (*z*).

This useful enactment is being utilized by vendors and purchasers. In illustration of this, reference may be made to *In re*

(*y*) Daniell's Chancery Practice, pp. 1165, 1166, 1170, 5th ed.

(*z*) The *Solicitors' Journal* observes, Vol. xviii. No. 53 (October 31st, 1874), on this section, "It is silent as to whether the question may be adjourned into court, or whether there should be an appeal from the judges' order; nor is power given to the court to make rules for the conduct of this new branch of its business." In a sale under decree or order, where the purchaser's requisitions cannot be satisfactorily disposed of between him and the vendor, the points in dispute are argued at chambers; but they may be *adjourned into court*; Seton on Decrees, 1192; *Pegg v. Wisden*, 16 Jur. 1105; and the same rule applies to cases arising under this section. It is laid down by Mr. Daniell (Ch. Pract. 1067, 5th ed.), that "an order made in chambers by the judge in person is subject to *appeal* in the usual manner." No express enactment on this point was therefore necessary. The Court of Chancery has inherent power to *regulate the conduct* of its own business.

Coward and Adams' Purchase (a). The intending purchaser of a copyhold estate had made a requisition, founded on an objection that the receipt of a married woman, who was deserted by her husband, and who had obtained a protection order, for a legacy of 400*l.* charged upon the estate, was not a sufficient discharge to the purchaser. The parties agreed to take the opinion of the Master of the Rolls on the requisition, and a summons was issued under sect. 9 of the Vendor and Purchaser Act, and adjourned into court. After hearing counsel for the vendor, as well as counsel for the purchaser, Sir George Jessel, M. R., delivered his opinion to the effect that the legacy was property which "came to or devolved upon" the wife, within the meaning of sect. 25 of the 20 & 21 Vict. c. 85 (The Divorce and Matrimonial Causes Act, 1857), and that, as by sect. 21 of that act she was in the same position with regard to the legacy, as if she had obtained a judicial separation, her receipt alone was a sufficient discharge to the purchaser. The form of the order of the Master of the Rolls was as follows:—"The court being of opinion that Mrs. Liggett, by virtue of the protection order, was empowered to give a valid receipt for the legacy of 400*l.*, declare that the requisition has been satisfied." It will be perceived that the section now under discussion enacts, that "the judge shall order how and by whom all or any of the *costs* incident to the application shall be borne and paid." In the case of *Coward and Adams' Purchase*, Sir George Jessel, alluding to these words, said, "Under the concluding words of the 9th section the unsuccessful party might be made to pay the costs of the summons. If that were done, it would go far to interfere with the beneficial operation of the act. Each party should pay his own costs." In the case of *Coward and Adams' Purchase* the parties agreed to take the opinion of the Master of the Rolls under the 9th section of the new act, and, therefore, it would have been unfair to throw the costs of the application entirely upon one of the parties.

In the following case Sir R. Malins, V. C., visited the unsuccessful party with the costs of the summons:—By a contract of

(a) 20 L. R., Eq., 179; 23 W. R., 605; 44 L. J. (Ch.), 384; 32 L. T. (N. S.), 682.

sale, dated 16th of November, 1874, entered into after private treaty with Mr. Charles Phillips, the vendor, and written upon a printed form indorsed on conditions of sale, subject to which the property had previously been put up for sale by auction and bought in, Mr. William Frederick Penfold, the purchaser, "acknowledged to have purchased the property, described as lot 3 in the particulars, for the sum of 575*l.*," and, after mentioning that he had paid to the auctioneer 25*l.* as a deposit, bound himself "to complete his purchase according to the within conditions of sale so far as related to a sale by private treaty." The fourth condition of sale concluded as follows:—"And if any person shall raise any objection to the title, or make any requisition which the vendor shall be unable or unwilling (whether on account of expense, trouble, or otherwise) to remove or comply with, the vendor shall be at liberty to vacate the sale upon returning only the deposit paid, without anything further for interest, costs, compensation, or otherwise."

Lot 3 was in the particulars described as "Twelve desirable leasehold cottages in High Street Row, near the Queen's Arms, Lower Tooting," let at rents equal to 139*l.* 2*s.* per annum, and "held in one lease for sixty years from the 25th December, 1844, at a rental of 12*l.*"

The abstract of title commenced with this lease, which was dated the 14th of August, 1845, and was made by Elizabeth Gregory to Edmond Arbon, and then showed an assignment of the property comprised in it from Edmond Arbon to James Arbon, who made a will, dated the 11th of September, 1849, by which, after giving his furniture to his wife, Mary Arbon, absolutely, he gave all the residue of his estate to his wife and William Hammond, upon trust, after payment of his debts and funeral and testamentary expenses, to invest the residue and to pay the dividends and produce thereof "unto his dear wife during the term of her natural life, and to his son, James Arbon [the younger], 100*l.* per annum out of the said dividends; and from and after her decease he devised the same and every part thereof unto and among all and every his children, both sons and daughters, who should be living at the time of the decease of his said wife, in equal shares and proportions, and the issue of such of them as should be deceased (such issue taking only

the share to which their deceased parent, if surviving, would have been entitled), to and for their own benefit absolutely." And he appointed his wife Mary Arbon and William Hammond executrix and executor, the former of whom proved the will on the 6th of April, 1864. The abstract of title then showed an indenture of mortgage, dated the 25th of July, 1867, by which, after reciting the above-mentioned lease, assignment and will, Mary Arbon and James Arbon, the younger, in consideration of 500*l.* paid to James Arbon, demised the property to Charles Phillips for the residue of the term granted by the lease, less ten days, subject to a proviso for redemption, and with a power of sale on default.

The contract was entered into by Charles Phillips as mortgagee of the property under the title thus shown.

It was stated that James Arbon, the younger, was the only child of the testator; but it was admitted that Mrs. Mary Arbon was still living, and that James Arbon had six infant children, who, if their father should die in the lifetime of Mrs. Arbon, would, on her death, be entitled to the property.

Under these circumstances the purchaser declined the title, whereupon the vendor claimed a right to rescind the contract, under the fourth condition of sale, upon returning the deposit without interest or costs.

The purchaser, thereupon, took out a summons at the chambers of Vice-Chancellor Malins, intituled in the matter of the contract and of the Vendor and Purchaser Act, 1874, describing the application as "an application on the part of the purchaser that it might be declared that the above-mentioned contract of sale had been broken by the vendor; and that the fourth condition of such contract of sale did not, under the circumstances, enable the vendor to vacate the sale; and that the purchaser was entitled to have the sum of 25*l.*, paid by him to the auctioneer as a deposit, repaid to him; and that the vendor might be ordered to pay to the purchaser interest on such deposit, and the costs of investigating the title, and all other costs and expenses incurred by him in consequence of the said contract and of the breach thereof by the vendor, *and also the costs of and incidental to this application* and all proceedings thereupon." This summons was filed as an original summons at the

Record and Writ Clerk's Office, and a sealed copy was served on the vendor's solicitors. The contract, abstract, requisitions and solicitors' letters were admitted by consent, and the vendor filed an affidavit in which he stated that "at the time of such contract being entered into he was not aware of any defect of title which could prevent the sale from being completed."

The summons, in the first instance, came before the Chief Clerk, Mr. Buckley, who expressed himself in favour of the purchaser, but, at the vendor's request, remitted the matter for the determination of the judge, and the application was now heard by Malins, V. C., at chambers.

For the purchaser, attention was drawn to two facts in connection with the defect of title objected to. First, it was of an indisputable nature, as plain as if a tenant for life were attempting to sell the fee. Secondly, it occurred in the last document of title prior to the mortgage to the vendor, and indeed appeared on the face of the mortgage, showing that the vendor must be taken to have been aware of it. He quoted Dart's Vendors and Purchasers, edit. 1871, 145, where it is said, referring to a condition of sale similar to the fourth condition in this contract, "Nor can the condition be relied on by a vendor who knowingly enters into a contract with a clearly defective title to a portion of the estate."

For the vendor a preliminary objection was taken, that the 9th section of the Vendor and Purchaser Act, 1874, was inapplicable to contracts made before the 1st of January, 1875. This was overruled. The fourth condition of sale was then relied on, and the affidavit of the vendor above referred to.

Malins, V. C. :—"Conditions of sale must receive a reasonable construction. Here is a defect of title of which the vendor was aware or must be taken to have been aware. A man is not at liberty to sell property without a title upon the chance of the purchaser taking it, and then, if the purchaser refuses it, to rely upon this condition. The vendor must pay the costs to which the purchaser has been put."

The minutes of the order to be drawn up by the Registrar, indorsed by the Chief Clerk on the summons, were as follows:—"His Honour being of opinion that the contract for sale, dated the 16th of November, 1874, has been broken by the vendor,

and that the fourth condition of such contract does not enable the vendor to vacate the sale, orders that the deposit be repaid to the purchaser, with interest at five per cent., and that *the vendor pay the costs, as asked by the summons*, to be taxed in case the parties differ (b).

It will be perceived that in this case the application was of a hostile character, and the applicant expressly claimed in his summons "the costs of and incidental to this application" (c).

In the following case the application was, also, of a hostile character, and not by arrangement, and Sir Charles Hall, V. C., followed the precedent of *Re Phillips and Penfold* in visiting the unsuccessful party with costs. In both cases the unsuccessful party happened to be the vendor, and the application was in both cases made by the purchaser.

By a contract of sale, dated January 21, 1875, and made between Francis Davey and Amelia Solomon, the said F. Davey agreed to purchase a freehold dwelling-house, shop and premises situate and being No. 96, Thomas Street, in the City of Bristol.

In the course of the examination of title a requisition was made as to whether the vendor was, or her solicitors were, aware of any judgments, settlements, mortgages, charges, or other incumbrances of any description affecting the property and not disclosed by the abstract.

The vendor's solicitors declined to answer this requisition so far as related to their personal knowledge.

The purchaser thereupon took out a summons in the chambers

(b) *Re Phillips and Penfold*, *Solicitors' Journal*, Vol. xix. p. 301. The writer has to thank the editor of the *Solicitors' Journal* (Vol. xix. p. 883) for calling his attention to this case.

(c) "The purchaser had a clear right, before the application was made, to have his deposit returned with all the costs he had been put to; and it would have been difficult, if not impossible, for the court to make a distinction, as against the purchaser, between his costs of the summons and his other costs." *Solicitors' Journal*, Vol. xix. p. 595. See also the remarks upon this decision in the *Solicitors' Journal*, Vol. xix. p. 883. The distinction between *Re Phillips and Penfold* and *Re Coward and Adams' Purchase* appears to be that the former was a hostile, the latter an amicable application.

of Vice-Chancellor Hall under the Vendor and Purchaser Act, 1874, that the vendor and her solicitors might be ordered to answer the requisition.

Hall, V. C., *ordered the vendor to answer the requisition.* The minutes of the order were as follows:—

Upon the application of the above-named Francis Davey, and upon hearing the solicitors for the application and for Amelia Solomon, the vendor, and upon reading an affidavit of James Roger Bramble, filed the 3rd of March, 1875, and the exhibits A. and B. therein referred to, it is ordered that the above-named Amelia Solomon, the vendor, do within seven days from the service of this order, answer the third requisition of the said Francis Davey as to whether the vendor is, or her solicitors are, aware of any judgments, settlements, mortgages, charges or other incumbrances of any description affecting the property not disclosed by the abstract of the vendor's title. And it is ordered that the said Amelia Solomon do pay to the applicant, Francis Davey, his costs of and consequent upon this application, to be taxed by the taxing master (d).

A curious point appears to have been raised by Sir George Jessel, M. R., in the case of *In re the Marquis of Salisbury (e)*, where the Marquis of Salisbury applied, under the present section, for the opinion of the judge at chambers as to whether it was necessary to appoint a guardian, to concur on behalf of his infant son, tenant in tail in remainder of land, which his lordship (who was tenant for life) was desirous of giving as a site for a church. The Master of the Rolls (according to one report) "took the preliminary objection" that the present section "did not apply to the case of a *voluntary gift*; but he allowed this objection to be *waived*, on admission, by counsel on both sides, of a contract for nominal consideration."

A vendor or purchaser of real or leasehold

(d) *Re Solomon v. Davey, Solicitors' Journal*, Vol. xix. p. 715. The judgment will be found in Vol. xix. p. 846. See also p. 842, and *Law Times*, Vol. lix. p. 224.

(e) The point is mentioned only in one of the reports of the case, 23 W. R. 824. The case is also reported 20 L. R., Eq., 527; 46 L. J. (Ch.), 541.

estate in Ireland, or their representatives respectively, may, in like manner and for the same purpose, apply to a judge of the Court of Chancery in Ireland; and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

This paragraph was not in the bill upon which the act is founded, as originally introduced. It was added, at a somewhat late stage of the bill, in the House of Lords (*f*).

SECTION 10.

Extent of Act.

This act shall not apply to Scotland, and may be cited as “The Vendor and Purchaser Act, 1874.”

The 10th clause of the bill on which the act is founded was added at the same time as the last paragraph of the preceding section.

(*f*) On the Report on Recommitment.



1875.

V. LAND TITLES AND TRANSFER.

38 & 39 VICT. c. 87.

AN ACT TO SIMPLIFY TITLES AND FACILITATE
THE TRANSFER OF LAND IN ENGLAND.

Preamble.

WHEREAS it is expedient to make further provision for the simplification of the title to land, and for facilitating the transfer of land, in England :

The expression "*further* provision," which occurs in the preamble to this act, evidently refers to the "provision" *already* made by the Land Registry Act of Lord Westbury (25 & 26 Vict. c. 53) and the Declaration of Title Act of Lord Cranworth (25 & 26 Vict. c. 68).

The Royal Commission (a) appointed by Mr. Disraeli's administration, in 1868, to inquire into the operation of the Land Registry Act of Lord Westbury, embodied in their interesting Report, which bears date 1869, a concise review of the efforts that were made prior to its passing to simplify titles to and facilitate the transfer of land.

(a) The Royal Commissioners were the late Lord Romilly, M. R., the late Lord Westbury, Mr. Spencer Walpole, M.P., Mr. Lowe, M.P., the late Vice-Chancellor (afterwards Lord Justice) Giffard, the late Mr. Howes, M.P., Mr. Hobhouse, Q.C., the late Mr. Waley, Mr. (now Sir Henry) Thring, Mr. Wolstenholme, the late Mr. John Young and Mr. W. J. Farrer.

This review (which will be found at p. 10 of the Report) is as follows :—

“ There is a body of fact to be dissected and examined, and if our diagnosis of this be correct, it should supply light enough to guide us to a better system for the future.

“ The plan recommended by the Report of the Royal Commission of 1857 may be stated in its main features as follows :— The leading principle is, that the fee simple title alone should be registered, subject, however, to the exception that charges and leases should have a separate registry of their own (ss. 43, 44). The report proposes that beneficial interests in the land not amounting to the fee and dealings with such interests should not be registered or at least not inserted into the register of the fee, for that such a system would practically amount to a registry of assurances (s. 45): that the registered title should not necessarily amount to a parliamentary or unimpeachable title (s. 48): that interests created before the commencement of registration should not necessarily be affected by it (s. 49): that equitable interests should be protected by cautions or notices on the register (ss. 50, 65, 66, 67): that it should be competent to a landowner to register with a statutory or indefeasible title if he desired it, and that such title should be guaranteed by the State (ss. 30, 57): that all registered titles should be subject to easements, general charges, and ordinary occupation leases (s. 63): that both central and district registries should be established (s. 51): and that the authority of the registrar should be ministerial and executive in its nature, and not judicial.

“ In the year 1859 two bills were introduced into the House of Commons by Lord Cairns, then Solicitor-General, and passed a second reading, after which their progress was stopped by a dissolution of parliament. We will shortly state their principal features. The first was called ‘ A Bill to simplify the Title to Landed Estates.’ It established a new tribunal called the Landed Estates Court, which was made a Court of Record. It provided that any person entitled to an estate in fee simple, or to convey such an estate, might apply to the court for a declaration that he had established his title. The court was then to require evidence and to publish notices, and to proceed to an

examination of the title by inquiries on the spot or otherwise. If satisfied, it was to make a provisional declaration that the applicant had established his title for the purpose of disposing of the land in favour of a purchaser for value. The declaration might be a simple one, or accompanied by conditions, or the reservation of the rights of other persons. After notice of the provisional declaration, and after the lapse of a certain time without objection, or on the removal or disallowance of objections, the declaration was to become final, except in case of appeal from the decision of the court to the Court of Chancery. The effect of the final declaration was thus expressed :—

“ ‘Sect. 14. Whenever the court has made a declaration that any person therein mentioned has established his title to the lands specified in the declaration, and such declaration has been duly confirmed by the court, or by the Court of Appeal, every purchaser for valuable consideration of the lands mentioned in such declaration, or of any part thereof, or of any interest in such lands, shall be deemed to hold the same for an estate in fee simple, or for such less estate as may be conveyed to him, with the reservations, and subject to the incumbrances, if any, appearing in the declaration, or created since the date of the declaration, and subject also, except in so far as the contrary is expressed in the declaration, to such charges and interests, if any, as are hereinbefore declared not to be incumbrances, but free from all other estates, incumbrances, and interests whatsoever.’ ”

“ The bill contained provisions for a conveyance of land by the court, if an intending purchaser desired to acquire his estate in that way. These provisions, and the effect of the conveyance followed a course similar to that relating to a declaration of title and the transfer to a purchaser for value.

“ The bill then provided for the protection of persons claiming partial interests in land by cautions to be lodged with the court, entitling them to notice, before the making of a provisional declaration or conveyance.

“ The second bill was called ‘ A Bill to establish a Registry of Landed Estates.’ It provided that every person entitled to a final declaration of title, or to a conveyance by the Landed Estates Court, might apply to that court to be registered. In

that case, instead of making the declaration or conveyance, the court might direct the registrar to enter the name of the applicant in the register as proprietor of the land. The registrar was to make the entry accordingly, and issue a certificate to the applicant. The effect of registry is thus described :—

“ ‘ Sect. 14. The registry as proprietor of land of any person entitled to a final declaration that his title is established shall be without prejudice to any estates and equities subsisting on such land at the time of registration; nevertheless, any purchaser for valuable consideration taking such land or any interest therein in pursuance of a registered or unregistered disposition, shall acquire the same estate or interest as he would acquire by a like registered or unregistered disposition made in his favour by a person entitled to a conveyance by the Landed Estates Court of land, and registered as proprietor; and the registry as the proprietor of land of any person entitled to a conveyance by the Landed Estates Court of land shall confer on the person so registered an indefeasible estate in fee simple, subject to the incumbrances, reservations and other matters, if any, entered on the register, and hereinafter included under the term incumbrances, and subject also, unless the contrary is expressed on the register, to such charges and interests, if any, as are hereinbefore declared not to be incumbrances; but free from all other estates, incumbrances and interests whatsoever, including estates, interests and claims of her Majesty, her heirs and successors.’

“ The bill then contained provisions for the purpose of charging registered land, and for the transfer of land, and of charges, which we need not here describe.

“ With respect to the transmission of registered land on death, the following important provisions were made :—

“ ‘ Sect. 35. On the death of the sole registered proprietor, or of the survivor of several joint registered proprietors, of any land, such person shall be registered in the place of the deceased proprietor or proprietors as may, on the application of any person interested in the land, be appointed by the Landed Estates Court.

“ ‘ Sect. 36. On the death of the sole registered proprietor, or of the survivor of several joint registered proprietors, of any charge, the executor or administrator of such sole deceased pro-

prietor, or of the survivor of such joint proprietors, shall be entitled to be registered in his place.

“Sect. 37. Any person appointed by the Landed Estates Court, or any executor or administrator, when registered in the place of any deceased proprietor of any land or charge, shall hold the land or charge in respect of which he is registered in trust for the persons and purposes to which it is applicable by law, but he shall, for the purpose of any registered dealings with any such land in favour of a purchaser for valuable consideration, be deemed to be absolute proprietor thereof.”

“It was provided that the registrar should not receive notice of any trust, but all unregistered interests in land (including leases) were protected by a system of cautions and notices to be entered in the register, and calculated to give ample opportunity to all persons so interested to intervene in any proceedings affecting their interests.

“On a careful study of the provisions of these bills of 1859, it will be observed that they proceed in their most material respects on the principles advocated by the Report of 1857. Great care is taken not to establish anything like a registry of assurances; the system of registration and transfer is assimilated, as nearly as the subject-matter admits, to the system regulating title to stocks; and partial interests are left to be protected by cautions and notices. The important points in which the bills depart from the plan of the Report are these: first, in establishing a new tribunal for passing judgment on titles to land without which no one could register; secondly, in restricting the class of titles to be placed on the registry. Indeed, the powers given to the court of reserving rights of classes of persons are expressed in such general terms, that it is difficult to say where the limits would be, within which titles could not from their recent date or otherwise be registered. But, from the machinery of notice and examination, which the court is directed to establish, it would seem that the bills did not contemplate the amount of freedom in registering titles, which was recommended by the Report of 1857, and which we shall hereafter re-urge.

“In the year 1862 the subject was resumed, and the act was passed of which we have now to examine the working. By

this act there is established a registry of estates of freehold tenure, and leasehold estates in freehold lands."

The Commissioners then proceed minutely to analyze the provisions of the Land Transfer Act of Lord Westbury, and to examine the causes of its comparative failure. These causes are thus summed up:—

"We have now completed the first part of our task, viz., our inquiry into the operation of the system established by the Act of 1862, and will here recapitulate the conclusions we have arrived at. We find that persons who come to register their titles are subjected to delay, expense and vexation, far beyond what occurs in an ordinary sale; that these evils have deterred nearly all who have tried the system from persevering in it; but they are not to be attributed to shortcomings in the machinery of the office, or in the officials personally; that they are directly and visibly traceable to the main principle of the act, that is to say, to the necessity which it imposes of

A., showing a marketable title;

B., defining boundaries;

C., registering partial interests:

"That to compensate these immediate disadvantages there is no subsequent advantage to be hoped for, but, on the contrary, that a registered owner may rather look for

A., expense in future entries;

B., a clouded title;

C., possible litigation at the option of the registrar or a judge of the Court of Chancery:

And that, under these circumstances, and for these reasons, the system has failed."

The Land Transfer Commissioners thus briefly refer to Lord Cranworth's Act, which was passed in the same session as the Land Transfer Act of 1862:—

"We ought to add to the statement of essays at legislation another act passed in the year 1862, and called 'An Act for obtaining a Declaration of Title.' It contains provisions enabling landowners to apply to the Court of Chancery for a declaratory decree, affirming their title to the land. We understand, however, that the act has remained a dead letter on the statute book, and that no attempt has been made to use it."

The Land Titles and Transfer Bill of 1874 contained a clause—the 153rd—repealing the Declaration of Title Act, 1862. The enactment of 1875 does not contain any similar provision.

In 1870—the year in which the Land Transfer Commissioners made their report—Lord Hatherley, who was then Lord Chancellor, “laid on the table” of the House of Lords a Land Titles and Transfer Bill. It was not, however, proceeded with (*b*).

In the year 1873, Lord Selborne, then Lord Chancellor, introduced a Land Titles and Transfer Bill, which passed the second reading in the House of Lords, but was not sent down to the House of Commons. This bill provided, that “on every occasion of a sale of land in fee simple,” “registration” should be “compulsory after the lapse of two years from the commencement of the act.” “Before sale no one” was to be “compelled to register a title or submit it for registration, but in each case when the land was sold, the land was to be brought on the register” (*c*). The bill, like Lord Hatherley’s, provided for the establishment of a Board of Registry, to include the Lord Chancellor, the Chancellor of the Exchequer, and the Registrar, but devolved upon the Court of Chancery, exclusively, the duty of deciding any question relating to caveats. Lord Cairns, on acceding, for the second time, to the woolsack, in 1874, introduced a Land Titles and Transfer Bill, which passed the House of Lords, and was sent down to and read a second time in the House of Commons, but was withdrawn near the close of the session through the pressure of other business.

From this retrospect, it will be seen that the question of “making further provision for the simplification of the title to land, and for facilitating the transfer of land” was ripe for a final decision in the Session of 1875.

Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and

(*b*) “It did not in all points follow the recommendations of the Commissioners, though it did adopt several of the most important of them.” Per Lord Selborne, C.: *Hansard’s Parliamentary Debates*, vol. ccxv. p. 1127.

(*c*) Per Lord Selborne, C., when introducing the Bill of 1873: *Hansard’s Parliamentary Debates*, vol. cxv. p. 1133.

consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

SECTION 1.—*Short Title.*

Preliminary.

This act may be cited as the Land Transfer Act, 1875.

It may facilitate a perusal of the act, if the explanations of its provisions, which were given in parliament by eminent legal authorities, are placed before the reader. The debates upon it in the House of Lords, in 1875, turned mainly upon the policy of a compulsory, as contrasted with that of a purely voluntary, system of registration; and, as all idea of a compulsory system has (at least, for the present) been abandoned, it is needless to encumber this work with the arguments in favour of and against that system.

In the debates, however, on the Land Titles and Transfer Bills of 1873 and 1874, in the House of Lords, speeches were made by the late and the present Lord Chancellors, which throw considerable light upon the general principles on which the Act of 1875 (in common with those bills) is founded.

Lord Selborne, when introducing his Land Titles and Transfer Bill, in 1873, pointed out the analogies, upon which a system of registration of the titles to and transfer of land proceeds (*d*):—

“Long ago, though not longer ago than most of us, who are not very young men, can remember,—it struck some reformers that an improvement on [the existing] system was not only most desirable, but would be of great public advantage—that there were other kinds of property which were dealt with in a very different manner, and with a facility, simplicity and absence of expense, which, if they could possibly be applied to dealings with land, must greatly enhance its value. It struck

(*d*) Hansard's Parliamentary Debates, vol. ccxv. pp. 1118, 1119.

them that, as in the sale of stocks in the public funds, shares in the public banks, shares in public companies, and shipping, there were no deductions of title, no abstracts, no objections, no requisitions, no suits for specific performance, and no long bills of costs coming after, but only a simple entry in a public registry, it was worthy of consideration whether, while recognizing the difference between the nature of the things themselves, it might not be possible to establish approximately the same simple system in the case of dealings with land. And I think I may say, that all who have carefully inquired into the subject have come to the conclusion that, though you cannot in every respect come to an identity of system, in dealing with these different kinds of property, you can approach very nearly to such a result." Lord Selborne then pointed out the chief points of difference between land on the one hand, and stocks in the public funds, and shares in public companies, and in ships, on the other: "When you are dealing with stocks in the public funds, or shares in public companies, you are dealing with abstractions—with aliquot parts, which bear an arithmetical proportion to the whole thing, which is a homogeneous whole, capable of subdivision, but no particular part having a value greater or less than another; and which no one can possess *in specie*." A ship is, no doubt, not an "abstraction," but the sixty-four shares into which a ship is divided *are* abstractions, like the shares in a public company. "Each ship is a unit in itself, all the parts of it contributing to the use and value of all the others; and though you may fix on particular parts," all the shareholders in a ship "have an interest in her as a whole, and none of them have a separate interest in any particular part; so that you can fix upon a numerical quotient by which the interest can be divided among any number of owners." On the other hand, "each particular part of the land has its own particular qualities, and is, therefore, capable of *specific* subdivision. There is not a uniformity of value throughout the land, and each person entitled to a portion of it desires to possess that portion as a *specific* thing" (e). These remarks of Lord Selborne may serve

(e) Each part of the land, in short, has a *pretium affectionis* of its own.

to disabuse the mind of the public of the very common notion that the law of real property can and ought to be merged or swallowed up in the law of personal property. "Distinctions exist in the [very] nature of the several things."

On the introduction of the Land Titles and Transfer Bill of 1874, the Lord Chancellor (Lord Cairns) thus explained (*f*) the difference between a registry of title to land and a registry of deeds and assurances of land, and its bearing on the failure of Lord Westbury's Land Registry Act (25 & 26 Vict. c. 53): "The phrase, 'registry of title to land,' is very frequently used without adequate precision as to [its] meaning, and therefore I must ask you to allow me in a few sentences to explain what it really is; and I can best so do by asking you to note the difference between a registry of the title to land and a registry of deeds and assurances of land. The latter may be thus stated: Every deed connected with property is placed upon the register; it is either transcribed at length, or described in a succinct and formal manner, and the consequence is that the register becomes *an historical narrative of all the deeds of every kind connected with the property*. It is obvious that a register of that kind may add security to the title to land, but it by no means facilitates the transfer of land. On the contrary, it has quite the opposite effect, because a mass of deeds is placed on the register, and if a person purchases land, he has not only to ask for an abstract of the title, and examine the original deeds, but he has also to go to the register, and see that the entries correspond with the deeds themselves.

"We now come to the registry of title to land. *In the registry you will have no deeds whatever*. You will have on the register a description of the property—where it is—how it is called—and, as far as possible, its boundaries; but beyond those particulars you will have nothing except the name of the proprietor of the land. . . . The late Lord Westbury, as Lord Chancellor, introduced a bill on this subject, which was subsequently carried through parliament. It was based on the principle of a 'Registry of Title to Land,' so far as the term [was concerned],

(*f*) Hansard's Parliamentary Debates, vol. ccxviii. p. 319 (March 26th, 1874).

but it was not a measure for the registry of [title to] land in the sense in which I have endeavoured to explain it. It was a registry, which, under the name of a registry of land, was a registry of deeds; and to my mind, at least, it was a registry of deeds of the worst kind, because it was a system under which the person registering had the power to place on the register, not the deeds themselves, but a statement of what he conceived to be the effect of the particular deeds. In the House of Commons I took the liberty of objecting to that system on two grounds. The first was the ground I have just stated; the second was that the bill provided that in the registration of estate the boundaries of the estate should be settled irrevocably by a judicial decision, the probable consequence of which would be disputes as to boundaries among the adjacent owners. However, the bill passed into law. A number of proprietors brought in their properties for registration under that act; but the number was so small as compared with the aggregate of proprietors of land in this country, that the act is generally regarded as a failure. . . . The Royal Commission appointed to inquire into the working of the Act of 1862 states what, in the minds of the Commissioners, had been the causes of its failure. I think the most conspicuous are the causes which I have already stated—its mode of dealing with boundaries, and its want of simplicity in placing what I may call the title deeds on the register.”

In the House of Commons the discussion on the bill of 1875 was, by arrangement, taken on going into committee on the 4th of June.

On the order of the day for going into committee on the bill being read, the Attorney-General said (*g*) that, in moving last year the second reading of a measure of a similar character to the present one, he indicated what appeared to him to be the necessity of legislation on that subject, the object for which such legislation was desirable, and the means by which it was proposed to accomplish that object. He did not suggest that the present bill would effect any very great saving of expense in first establishing the absolute title of a person to property. The real advantage of having a register of titles was that when

(*g*) *Times*, Saturday, June 5th, 1875, Parliamentary Report.

to disabuse the mind of the public of the very common notion that the law of real property can and ought to be merged or swallowed up in the law of personal property. "Distinctions exist in the [very] nature of the several things."

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"We now come to the registry of title to land. *In the registry you will have no deeds whatever*. You will have on the register a description of the property—where it is—how it is called—and, as far as possible, its boundaries; but beyond those particulars you will have nothing except the name of the proprietor of the land. . . . The late Lord Westbury, as Lord Chancellor, introduced a bill on this subject, which was subsequently carried through parliament. It was based on the principle of a 'Registry of Title to Land,' so far as the term [was concerned],

(f) Hansard's Parliamentary Debates, vol. ccxviii. p. 319 (March 26th, 1874).

but it was not a measure for the registry of [title to] land in the sense in which I have endeavoured to explain it. It was a registry, which, under the name of a registry of land, was a registry of deeds; and to my mind, at least, it was a registry of deeds of the worst kind, because it was a system under which the person registering had the power to place on the register, not the deeds themselves, but a statement of what he conceived to be the effect of the particular deeds. In the House of Commons I took the liberty of objecting to that system on two grounds. The first was the ground I have just stated; the second was that the bill provided that in the registration of estate the boundaries of the estate should be settled irrevocably by a judicial decision, the probable consequence of which would be disputes as to boundaries among the adjacent owners. However, the bill passed into law. A number of proprietors brought in their properties for registration under that act; but the number was so small as compared with the aggregate of proprietors of land in this country, that the act is generally regarded as a failure. . . . The Royal Commission appointed to inquire into the working of the Act of 1862 states what, in the minds of the Commissioners, had been the causes of its failure. I think the most conspicuous are the causes which I have already stated—its mode of dealing with boundaries, and its want of simplicity in placing what I may call the title deeds on the register.”

In the House of Commons the discussion on the bill of 1875 was, by arrangement, taken on going into committee on the 4th of June.

On the order of the day for going into committee on the bill being read, the Attorney-General said (*g*) that, in moving last year the second reading of a measure of a similar character to the present one, he indicated what appeared to him to be the necessity of legislation on that subject, the object for which such legislation was desirable, and the means by which it was proposed to accomplish that object. He did not suggest that the present bill would effect any very great saving of expense in first establishing the absolute title of a person to property. The real advantage of having a register of titles was that when

(*g*) *Times*, Saturday, June 5th, 1875, Parliamentary Report.

a property had once been placed on the register, it could be subsequently dealt with at a trifling cost and trouble (*h*). The bill was an honest attempt to deal with an important question; and if passed into law it would introduce a beneficial change into the mode of dealing with land, and the titles under which it was held.

The debate on going into committee on the bill was suspended by the rules of the House of Commons, while Mr. Goldney was speaking in favour of the measure. It was resumed by that hon. gentleman ten days later; and he was followed by Mr. Gregory, who said, that the objections against the successful working of Lord Westbury's Act were, first, that it required the registry of an indefeasible title; secondly, the necessity of giving notices to adjoining owners; and, thirdly, the necessity of placing all subservient interests upon the registry, as well as the primary title to the land. This bill was free from these objections. Under it a man might register an indefeasible title, a qualified title, or a possessory title, dating from the time of registration. . . . He did not agree with those who said that the measure would prove a nullity. On the contrary, he knew that owners were waiting for the passing of the bill to register under it. They would not be called on to prove an indefeasible title, and have a slur cast upon their title by a refusal to register at all if they could not prove an absolutely valid title. As to notices to adjoining landowners, there was one case in which, under Lord Westbury's Act, it became necessary to serve 130 such notices; and by giving these notices you not only incurred great expense, but aroused the sleeping

(*h*) This view of the act is thus forcibly illustrated by Mr. E. H. Holt, in his learned "Handybook on the Registration of Title," 70:—"To facilitate the *transfer* of land has been the principal object of the various Royal Commissions and committees, that have during the present century inquired into the subject of Real Property Law in relation to conveyancing, and of the bills introduced into Parliament on the same subject. The present act effectuates the object by *reducing the title of land to a system of book-keeping*, and by enabling a transfer to be made in ordinary cases, practically, by merely running the pen through the name and description of the transferor, and adding those of the transferee."

lion and invited adverse claims upon such questions as boundaries, fences, or the right of way. As to incumbrances, the registered owner under the bill had full power to make a title in case of sale. Persons beneficially entitled might protect themselves by putting a caution upon the registry and in other ways. Speaking generally, he thought the bill likely to prove acceptable to the public and a considerable benefit to vendors and purchasers of land.

Mr. (now Sir Henry) Jackson, Q.C., thought the bill contained much that was valuable, and he believed it would be a useful addition to the statute book. The transfer of land did not differ in essence from the transfer of a ship. A ship did not pass by delivery, but by statutable transfer, which gave a right against all the world, and was not affected by any equitable interest. What prevented us from dealing with land substantially in the same way? He believed the establishment of country registries, where intending purchasers of land could consult maps and index books, would prove a most valuable adjunct to any system of land transfer. He was not sanguine, however, that such a plan could speedily be brought into operation. A basis for it was presented by the existing ordnance survey, and he hoped the Government would next year make provision for accelerating this work. As for the fears expressed in some quarters that the object of the bill would be defeated by the solicitors, he believed them to be entirely unwarranted. He believed this bill would prove itself to be a valuable addition to the cause of progress which had now for some years set in.

Sir J. Karslake, Q.C., quite agreed with his hon. and learned friend (Mr. Jackson) that this bill was so framed that, although not ambitious in its character, it would, in all probability, prove of the greatest advantage in simplifying the transfer of land. The failure of Lord Westbury's Act was due almost entirely to the character of the measure and the mode in which it was proposed to carry it out. Questions of boundaries and fences were very difficult to determine; but it was quite certain that, as a general rule, in the case of property held for a long time with little doubt as to the real boundaries, that doubt should not prevent a register of title such as was proposed by this bill from being formed, which to a very considerable extent would simplify the

transfer of land. What was proposed by this bill? It was said to be not worth while to put a title on the register. But it would get rid to a great extent of the expense of furnishing an abstract of title, and the long and cumbrous proceedings connected therewith. Great simplification of title for the transfer of land was provided for; and there were great advantages connected with the registering even of a qualified or possessory title. The advisers of the landed gentry, so far from hindering the operation of the measure, would be the first to recommend it. He believed much advantage was to be expected from the working of the measure, and that it would prove a most useful stepping-stone to further reforms in relation to the land question as a whole (i).

SECTION 2.

Application of Act.

This act shall not apply to Scotland or Ireland, and land shall not be registered under this act unless it is of freehold tenure or is leasehold held under a lease which is either immediately or mediately derived out of land of freehold tenure; but for the purposes of this act customary freehold, in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchase from the customary tenant, shall not be deemed to be land of freehold tenure.

Ireland is already provided with a Landed Estates Court, erected, in 1858, by the present Lord Chief Justice of Ireland,

(i) To these quotations from speeches in Parliament may be added one from a text writer (Holt's Registration of Title, 25):—"The bill proposed to establish, in effect, though not in name, a *Landed Estates Court, of which the registrar should be the judge*. It proposed that the registrar should have power to examine titles, to hear and determine objections, and to summon and examine witnesses, and that the power to deal with caveats affecting the registered land should be vested in him."

and which has conferred signal benefit upon that country. The act, which established that court (*j*), was preceded (*k*) by "An Act to facilitate the Sale and Transfer of Incumbered Estates in Ireland," which provided for the appointment of commissioners, with judicial powers, who were charged with the execution of the act. The statistical returns show that during the nine years over which the commission extended, 4,413 petitions were presented for the sale of estates, of which number about one-third were presented by the owners, and the other two-thirds by persons having incumbrances. These petitions resulted in the sale of about 3,000 estates in nearly 9,000 lots, varying in size from the small farm to a territory of 192,000 acres. The purchase-moneys of these estates amounted in all to over £23,000,000 sterling. The lands sold were vested in their respective purchasers by means of 8,364 statutory conveyances, which conferred on the grantees named in them an indefeasible parliamentary title.

Mr. Denny Umlin (*l*), in his useful note on "Land Transfer in Ireland," prefixed to the treatise by himself and Mr. Key on Lord Westbury's Land Registry Act, thus comments on the success of the Irish Landed Estates Court, into which the Irish Incumbered Estates Commission was converted in 1858. "The result of the Irish system undoubtedly is that land may be bought and sold with facility and safety; and it is an important fact that the owners of land generally, and their legal advisers, prefer effecting sales and purchases through the instrumentality of the court; *and few estates of any magnitude are now sold or transferred in any other manner*" (*m*).

(*j*) 21 & 22 Vict. c. 72.

(*k*) 11 & 12 Vict. c. 48; 12 & 13 Vict. c. 77; 15 & 16 Vict. c. 67; 16 & 17 Vict. c. 74.

(*l*) The Transfer of Land Act, 1862, illustrated by the practice and decisions under analogous Irish Acts, by R. Denny Umlin, Examiner in the Landed Estates Court, Ireland, and Thomas Key, 1863.

(*m*) It is only right, however, to mention that Mr. Umlin points out that "it is at once evident to the most casual observer, that the constitution of a judicial tribunal having the control over the transfer of and title to land, offers many points of contrast to the system of voluntary land registry, introduced by Lord Westbury's Bill." See, however, now Holt's Registration of Title,

Passing from Ireland to Scotland, we find that in 1874 an act was passed by the Imperial Parliament to simplify title to and facilitate the transfer of land in the northern portion of this island. The act is intituled, "An Act to amend the Law relating to Land Rights and Conveyancing, and to facilitate the Transfer of Land, in Scotland" (*n*). The passing of this measure was mainly due to the efforts of the present Lord Advocate of Scotland, Mr. Gordon. A register of "sasines" had, prior to the passing of this act, existed in Scotland for centuries.

The reader who wishes to obtain accurate and interesting information respecting the Australian system of State conveyancing, is referred to a valuable return to an Address of the House of Commons, containing replies from the Governors of South Australia, Queensland, New South Wales, Victoria and Tasmania, to a circular despatch of the Secretary of State for the Colonies, calling for reports from them on the working and progress of the system of conveyancing by registration of title in operation in those colonies (*o*). From this return it appears that the land in New South Wales (*p*) registered under the local Land Transfer Act, at the end of 1869, reached 1,151,558 acres, the estimated value being £3,024,992. In Tasmania (*q*), 1,908 certificates of title and 1,645 grants, including 4,730 acres of town allotments and 302,103 acres of country lands, of the aggregate value of £750,894; also 644 mortgages securing £275,623; also 563 transfers, conveying 903 acres of town and 41,834 acres of country lands, for the sum of £134,648; also 169 releases of mortgages, involving £76,554; also 24 assignments of mortgages, involving £13,186; and 43 leases of 70 acres of town and 10,319 acres of country land were registered up to the 1st of July, 1870. In South Australia (*r*) the total area registered under the local Land Transfer Act, on the 31st of

25, cited under sect. 1, where he shows that the registrar is, "in effect, though not in name," Judge of a Landed Estates Court.

(*n*) 37 & 38 Vict. c. 94.

(*o*) Sessional Papers, 1872, No. 190, p. 237. Price 2s. 6d.
Published by Mr. Hansard, Printer to the House of Commons.

(*p*) Page 3.

(*q*) Page 136.

(*r*) Page 153.

December, 1869, was 2,763,887 acres, exclusive of 244,962 acres sold in the northern territory, leaving under the old system only 1,193,039 acres.

The words, "in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchase from the customary tenant," were not in the present section as it was originally framed; they were added in Committee in the House of Commons. Customary freeholds are entirely excluded from Lord Westbury's Act, the language of the second section of that act being, "the registry shall be confined to estates of freehold tenure and leasehold estates in freehold land." Copyholds are excluded from, and burgage and gavelkind lands are included in, both acts.

The "leasehold land," to fall within this section, must, by section 11, *infra*, be "held under a lease for a life or lives, or determinable on a life or lives or for a term of years of which more than twenty-one are unexpired, whether subject or not to incumbrance." This is a more liberal definition of "leasehold land" than that contained in Lord Westbury's Act, section 26 of which defines it to mean "land demised for terms of years of which fifty years are still to come and unexpired, or demised for lives or for years determinable with lives, and in which two lives at least are subsisting." The recommendation of the Land Transfer Commissioners was, "that beneficial leases *originally created* for more than twenty-one years should be treated as absolute ownerships entitled to registration" (*s*).

As to the registration of advowsons, rents, tithes impropriate, or other incorporeal hereditaments enjoyed in gross, mines and minerals severed from the land, fee farm and other grants, see section 82, *infra*.

SECTION 3.

Commencement of Act.

This act shall come into operation on the 1st day of January, 1876, which day is in this act referred to as the commencement of this act; but

(*s*) Report, page xxxii, Recommendation V.

any orders or rules, and any appointment to any office, may be made under this act at any time after the passing thereof, but shall not take effect until the commencement of this act.

The power to make "rules" is, by sections 111, 112, and 121, 123, *infra*, vested in "the Lord Chancellor;" under section 111, "with the advice and assistance of the Registrar." The "matters," with respect to which the Lord Chancellor, with such advice and assistance, may make "rules," are defined by the same sections. Sections 118 and 126, *infra*, specify matters respecting which the Lord Chancellor may issue "orders." As to district registries, such orders can, under sect. 118, only be made by him with the concurrence of her Majesty's Treasury. See also section 104.

By section 106, the Lord Chancellor is empowered to appoint a registrar, and also, with the concurrence of the Treasury, to appoint assistant registrars, clerks, messengers, and servants.

By section 118, the Lord Chancellor, with the concurrence of the Treasury, is empowered to appoint district registrars, assistant district registrars, clerks, messengers, and servants for district registries.

The date of the "passing" of the act was the 13th of August, 1875.

SECTION 4.

Construction of Terms in Act.

In this act, unless there is something inconsistent in the context,—

"Person" includes a corporation and any body of persons unincorporate:

"Registrar," "court," and "general rules," mean such "registrar," "court," and "general rules" as are in this act respectively in that behalf mentioned:

"Prescribed" means prescribed by any general rules made in pursuance of this act:

"The Court of Chancery," and "Court of Appeal in Chancery," and "Her Majesty's Superior Courts," include any courts in which the powers of the courts so referred to by name, may be for the time being vested:

"The Land Registry Act, 1862," means the act passed in the session held in the twenty-fifth and twenty-sixth years of the reign of her present Majesty, chapter fifty-three, intituled "An Act to facilitate the Proof of Title to and the Conveyance of Real Estates."

The definition of "land" contained in the act of the thirteenth and fourteenth years of the reign of her present Majesty, chapter twenty-one, intituled "An Act for shortening the Language used in Acts of Parliament," shall not apply to this act.

As to the "registrar," see sections 107 and 123, *infra*. The expression is sometimes qualified by the word "assistant," sometimes by the word "district," the context explaining the meaning.

The word "court" is defined by section 114.

As to "general rules," see section 111.

As to the courts in which the powers of the Court of Chancery, the Court of Appeal in Chancery, and her Majesty's Superior Courts, were vested on the 1st of November, 1875, see the Supreme Court of Judicature Act, 1873 (*t*), sections 3, 4, 5, 16, and 18; the Supreme Court of Judicature Act, 1875 (*u*), sections 3 and 4; and Charley's "Judicature Acts," pp. 3—9, 19—22, and 196—207, 2nd ed.

The "Land Registry Act, 1862," is better known as "Lord Westbury's Act."

The definition of "land" contained in the 13 & 14 Vict. c. 21 (*v*), is as follows:—

"In all acts the word 'land' shall include messuages, tene-

(*t*) 36 & 37 Vict. c. 66.

(*u*) 38 & 39 Vict. c. 77.

(*v*) Section 4.

ments and hereditaments, houses and buildings, *of any tenure*, unless there are some words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure."

See the definition of "Court," s. 114.

"In the General Rules and Forms, unless there is something inconsistent in the context, 'the act' shall mean 'The Land Transfer Act, 1875;' 'land' shall include any interest the first proprietorship of which can be separately registered; 'the court' shall mean 'The Supreme Court of Judicature;' 'solicitor' shall include 'certificated conveyancer;' and 'declaration' shall mean 'statutory declaration,' and include 'affidavit.'" (General Rule 63.)

PART I.

ENTRY OF LAND ON REGISTER OF TITLE.

(1.) *Freehold Land.*

SECTION 5.

Application for Registration with an Absolute Title, or with a Possessory Title only.

A land registry shall be established, and on and after the commencement of this act the following persons; (that is to say,)

- (1.) Any person who has contracted to buy for his own benefit an estate in fee simple in land, whether subject or not to incumbrances; and
 - (2.) Any person entitled for his own benefit at law or in equity to an estate in fee simple in land, whether subject or not to incumbrances; and
 - (3.) Any person capable of disposing for his own benefit by way of sale of an estate in fee simple in land, whether subject or not to incumbrances,
- may apply to the registrar under this act to be

registered, or to have registered in his stead any nominee or nominees not exceeding the prescribed number, as proprietor or proprietors of such freehold land with an absolute title or with a possessory title only: provided, that in the case of land contracted to be bought, the vendor consents to the application (x).

"There shall be established a registry of title to landed estates." (25 & 26 Vict. c. 53, s. 2.) The existing registry in London will practically be continued. (See sect. 123, *infra*.) The date of the commencement of this act is fixed by sect. 3, *supra*—the 1st of January, 1876.

"Person" includes a corporation. (Sect. 4, *supra*.)

"May apply." By the 38th General Rule, "every application to be made under these rules shall be signed by the applicant or his solicitor" (y).

By the 1st General Rule, "every application for registration shall state the nature of the interest of the applicant, and a general description in concise terms of the land, and shall refer to the particular description to be left therewith. It shall also state whether the registration applied for is with an absolute or a possessory title." (See Form 1.)

By the 3rd General Rule, "a particular description of the land comprised in the application and, as part thereof, an extract on tracing linen from the public map, with a reference, where necessary, to a revision and enlargement of such extract, to be made also on tracing linen, delineating the land and defining its locality, shall be left with the application. This description shall be signed by the applicant or his solicitor, and the extract shall have a margin of at least two inches left for annexing to the register; and the public map from which the

(x) By the 1st General Rule, "where the application is for the registration of a nominee, or is made by a purchaser, the consent in writing of the nominee or his solicitor, or the vendor or his solicitor, shall be left with the application."

(y) Mr. Holt strongly recommends (Registration of Title, 147, 148) the land owner to "seek, in the first instance, the assistance of a solicitor."

agreements for leases or incumbrances, or be situate within or held of any manor, the particulars of the *names and addresses* of the tenants, lessees, incumbrancers and lord of the manor shall be added to the description.

"The description and such last-mentioned particulars (if any) shall be *verified by the declaration* of the applicant (or of one of the applicants, if more than one, or of some person whose consent is required to the application) and his solicitor; such declaration shall be *left with the application*, and shall state that the actual possession or receipt of the rents and profits of the land comprised in the application is in accordance with the applicant's title."

Forms of declaration will be found in the schedule of forms, Forms 3 and 4.

General Rule 8 relates to abstracts and proofs:—

"If the application is for registration with an absolute title, or of leasehold land with or without a declaration of the title of the lessor, *an abstract of title shall be left with the application*. The abstract shall be in the usual form, regard being had to the provisions of the Vendor and Purchaser Act, 1874, and any opinion of counsel, or any requisitions and answers relating to the title that may be in the control of the applicant, shall also be left with the application. *The documents to be produced* in support of the abstract shall be *left with the application, or a place and time appointed*, on leaving the abstract, *for the production* of such documents.

"All abstracts and copies of documents left in the office shall be *examined and compared with the original* muniments, and all *searches and inquiries* which the registrar shall consider necessary in the investigation of or in relation to title shall be made, by such person and in such manner as the registrar shall direct. *A schedule of documents left* in the office in support of the abstract shall be left with such documents."

"The examination of the abstract with the deeds," it has been said (g), "can be but seldom made by the office clerks." The price per hour for such examination, if made in the office, is 5s.

By the 40th General Rule, "all abstracts and copies of docu-

ments and all documents for registration left in the office shall be *retained in the office, pending completion* of the registration to which they relate, and shall be afterwards dealt with as the registrar shall direct. Abstracts and documents shall be examined with the originals as provided by Rule 8.

"The registrar may require an abstract or concise statement to be furnished and duly vouched of any deeds and documents left in the office and necessary to be perused in the course of any registration proceeding."

The 41st General Rule provides that "the registrar may refuse to receive any abstract or document that is not fairly written, lithographed or printed, or in conformity with the rules of the office."

A stamp of 10*s.* value must be affixed to every abstract of title lodged at the office (*r*).

As to reference of title, see General Rule 9, cited under sect. 111.

The stationer's charges, sanctioned by the Lord Chancellor, are, for every copy of any document, 2*d.* per folio or part of a folio; for every office copy, 4*d.* per folio or part of a folio; for envelopes, stamped with the office stamp, 1*d.* apiece (*r*).

The 46th General Rule provides as follows for the verification of instruments:—

"Where the signing or execution of any document is required to be duly verified, such signing or execution shall be *attested by a solicitor*, and such verification shall be made by his declaration; and where the document is signed or executed by a person named or referred to on the register, such declaration shall identify the person signing or executing the same accordingly."

The 47th General Rule provides as to declarations:—

"Declarations to be used in the course of registration may be made in the office, or before any person authorized by law to take statutory declarations. The registrar may, if he think fit, require *evidence* to be given *vivâ voce* before him (*s*). All declarations shall be filed in the office, and office copies thereof (if required) taken for use."

The charge for an affidavit or declaration *sworn or taken in*

(*r*) Schedule of Fees, Order of 30th December, 1875.

(*s*) See sect. 109.

the office is 1s. 6d.; for every affidavit or declaration *filed* in the office, 2s. 6d. The fee for every notice under the official stamp is 1s.; for every summons to attend the registrar, 3s.

The act itself contains no provisions on the important subject of maps of the premises, except that the registrar may enforce their production (sect. 109).

The 50th General Rule provides as follows:—

“*The ordnance map* comprising the land and its locality on the largest scale for the time being published, not being a smaller scale than that known as ‘*the 25-inch scale*,’ shall be the public map of the land. If there is no such map, *the map under the ‘General Inclosure Act, 1845,’* or in default thereof *the tithe map* comprising the land and its locality, shall be the public map of the land. In default of any such map, *the ordnance map*, though on a *less scale than the 25-inch scale*, shall be the public map (*t*), and in that case any extract required to be furnished from the public map shall be explained by a revision and enlargement of such extract in manner provided by the 3rd Rule.

“The registrar may at any time declare that any map shall be deemed a public map for the purposes of registration, or, if he think fit, may, with the consent of the Commissioners of the Treasury, cause copies or reprints of any map or parts of any maps to be made, either on the existing or on an enlarged scale, and either revised or not, and may distinguish the land comprised therein by numbers or otherwise, and declare such copies or reprints public maps for the purposes of registration, and where there is no public map on the 25-inch scale or upwards may, with the consent of the Commissioners of the Treasury, cause a public map to be made on such scale as he may think fit; and in any case in which any such copies, or reprints, or any map shall be declared a public map under this rule, the same, or copies under the seal of the office, shall be deposited in the office, and copies thereof published and sold in such manner and subject to such provisions as the registrar may direct; and after any map or document shall have been so declared a public map, it shall thenceforth, unless the registrar shall otherwise direct, be

(*t*) See, further, as to these various maps, Holt on Registration of Title, 34, 35.

the public map, reference to which is required for the purposes of registration.

By the 51st General Rule, "after any document has been declared by the registrar to be a public map, the registrar may, if he think fit, require that an extract therefrom shall be attached to the description of any registered land, in explanation of the extract from the public map by reference to which the land shall then be registered, and such new extract shall thenceforth be considered as the extract from the public map by reference to which the registration was made, and the registered description shall be explained accordingly."

The 39th General Rule provides, that "if any extract from the public map left in the office should be found to be insufficient or incorrect, the registrar may require a fresh extract to be left in the office for the purposes of registration. The registrar may also require a duplicate of any extract to be left for index purposes."

By the 61st General Rule, "if any extract or tracing from any map is required to be made, the same shall be made at the expense of the applicant, and a deposit to cover such expense shall also be left in the office when required."

The stationer's charges for tracings or copies of maps are payable by the applicant (*u*).

As to the powers with which the registrar is armed for enforcing the production of maps, surveys, deeds, wills, books and witnesses, see sects. 70, 71, 72, 109, and 110, *infra*.

By the 42nd General Rule, "if any document left in the office for registration purposes has been executed under a power of attorney, the power of attorney shall be produced and, if the registrar shall so direct, left in the office, and the execution thereof by and the identity of the principal and the execution of the document by and the identity of the attorney shall be duly verified, and such evidence furnished, if any, that the power of attorney was effectual at the date of the execution of the document thereunder, as the registrar may direct."

By the 61st General Rule, "all documents required to be printed, and all printed, lithographed or written documents

(*u*) Schedule of Fees, Order of 30th Dec. 1875.

(other than maps) to be filed in the office, shall be printed, lithographed or written on *white foolscap paper*, and shall allow a *sufficient stitching margin*, in order that the same may be conveniently bound.

“The registrar may require that any document to be referred to on the register shall be printed for that purpose.

“The original of any document required to be printed shall be left in the office. In case no printed copy of such document shall be left in the office, a written copy for the printer should be left, and if no printed copy and no written copy, then a request for making such written copy and for printing the document through the office, at the applicant's expense, shall be left at the time of leaving such document, or otherwise as the registrar shall direct.”

Satisfactory replies having been received to the *requisitions on title* (if any) (v), the next step is the *statement of title*.

Rule 12 deals with the statement of title:—

“When the title is approved by the registrar as an absolute or qualified title, or in the case of leasehold land is approved by the registrar with or without a declaration of the lessor's title to grant the lease, the applicant shall furnish a statement of the following particulars, which the registrar shall settle for the purpose of framing therefrom, and from the description of the land, the entries for the register; that is to say,

“1st. The name, address and description of the proprietor to be entered on the register, and the nature of his proprietorship and title, and the qualifications (if any) of the title.

“2ndly. The incumbrances, including leases and agreements for leases, if any, to be entered on the register.

“3rdly. In the case of leasehold land, where a declaration of the title of the lessor to grant the lease is to be made, any entry required to be made in respect of such declaration; and also if the lease contains a prohibition against alienation without license, the particulars of the provision to be entered on the register by way of restriction to that effect.

" 4thly. Any other entry authorized by the act to be made on the register, and the entry of which is required or ought to be made.

" 5thly. If the description of the land require alteration, the particulars of such alteration.

" When such statement has been settled by the registrar notice thereof shall be given *by the applicant to all persons*, whether or not they shall have any interest noted therein, *to whom, in the registrar's opinion, notice should be sent*, and to any other person claiming any interest in the property who shall in writing have required the registrar to give him such notice and furnished an address in the United Kingdom for that purpose. *The statement may be seen in the office* by the applicant, and by any other person, whether or not notice has been given to him, who shall satisfy the registrar that he ought to be allowed to inspect the same, and *a copy shall, if required, be furnished* to the applicant at his expense. Any such person may object to such statement, and the *objection to such statement shall be made in writing signed by the objector* or his solicitor, and *left in the office* before the expiration of the period referred to in Rule 10, and shall contain an address in the United Kingdom on which service on the objector shall be made, and shall contain a concise statement of the particulars of the objection."

The 13th General Rule provides for the hearing of these objections:—

" The applicant or his solicitor shall obtain an appointment before the registrar for hearing any objection to the statement of title under Rule 12, which shall have been duly left in the office, and shall serve the objector with a notice in writing to come in and state his objection to the registrar at the time mentioned in such notice, such time not being less than seven clear days after service of such notice. The parties may be heard in person, or by counsel or solicitor."

Form 9 contains the form of notice to be given to the objector.

The registrar has, under subsection (2) of the present section, full judicial power to determine these objections, subject to appeal. (See the note to subsect. (2), *supra*.)

By the 9th General Rule, "*the costs of*" examining and "proving the title, and of searches and inquiries in relation

thereto, and the fees of any conveyancing counsel to whom any title, or points arising thereon, may be referred, shall be *paid by the applicant.*"

The regular office fees (*x*) for the entry of first proprietorship, with absolute or qualified title, are as follows:—

"If the value of the property does not exceed 1,000*l.*, for every 100*l.* or fractional part of 100*l.* of the value thereof, 5*s.*

"If the value exceed 1,000*l.*, but does not exceed 5,000*l.*, then for the first 1,000*l.* at the rate aforesaid, and for every additional 100*l.* or fractional part of 100*l.* of the value thereof beyond the first 1,000*l.*, 3*s.*

"If the value exceed 5,000*l.*, but does not exceed 20,000*l.*, then for the first 5,000*l.* at the rate aforesaid, and for every additional 100*l.* or fractional part of 100*l.* of the value thereof beyond the first 5,000*l.*, 2*s.*

"If the value exceed 20,000*l.*, then for the first 20,000*l.* at the rate aforesaid, and for every additional 100*l.* and fractional part of 100*l.* of the value thereof beyond 20,000*l.*, 1*s.*"

Rule 14 gives power to the registrar to modify the proceedings in cases of parliamentary title:—

"In any case where the registration affects land already registered, or relates to land allotted or taken in exchange on an inclosure, or under an order of exchange of the Inclosure Commissioners for England and Wales, and enuring to the registered title, or otherwise acquired by the applicant under a parliamentary title, the registrar may, if he so think fit, modify or waive the notice directed by the 10th Rule to be given by advertisement, and may otherwise modify the proceedings, and may complete the registration as soon as he considers it can properly be done."

For further information respecting the examination of title, the reader may look in the Index under the appropriate heading.

(*x*) Schedule of Fees, Order of 30th Dec. 1875.

SECTION 18.

Liability of Registered Land to Easements and certain other Rights.

All registered land shall, unless under the provisions of this act the contrary is expressed on the register, be deemed to be subject to such of the following liabilities, rights (*y*), and interests as may be for the time being subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed incumbrances within the meaning of this act; (that is to say,)

- (1.) Liability to repair highways by reason of tenure, quit rents, crown rents, heriots, and other rents and charges having their origin in tenure; and
- (2.) Succession duty, land tax, tithe rent-charge, and payments in lieu of tithes, or of tithe rentcharge; and
- (3.) Rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water, and other easements; and
- (4.) Rights to mines and minerals; and
- (5.) Rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals; and
- (6.) Rights of fishing and sporting, seignorial and manorial rights of all descriptions, and franchises, exerciseable over the registered lands; and
- (7.) Leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate,

(*y*) "The rights referred to are evidently *adverse* rights."
(Note by the Assistant Registrar, MS. *pence me.*)

in cases where there is an occupation under such tenancies :

Provided as follows :

- (a.) Where it is proved to the satisfaction of the registrar that any land registered or about to be registered is exempt from land tax or tithe rentcharge, or from payments in lieu of tithes, or of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner ; and
- (b.) The Commissioners of Inland Revenue shall, upon the application of the proprietor of any land registered or about to be registered, upon such declaration being made, or such other evidence being produced as the commissioners require, and upon payment of the prescribed fee, grant a certificate that at the date of the grant thereof no succession duty is owing in respect of such land, and the registrar shall in the prescribed manner notify such fact on the register, and such notification shall be conclusive evidence of the fact so notified in respect of succession duty ; and
- (c.) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is vested in the proprietor of land registered or about to be registered, the registrar may register such proprietor in the prescribed manner as proprietor of such mines and minerals as well as of the land (z) ; and

(z) "This points to a right to the mines independently of a right

(d.) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is severed from any land registered or about to be registered, the registrar may, on the application of the person entitled to any such mines and minerals, register him as proprietor of such mines and minerals in manner hereafter in this act mentioned, and upon such registration being effected shall enter on the register of the land a reference to the registration of such other person as proprietor of such mines and minerals.

Where the existence of any such liabilities, rights, or interests, as are mentioned in this section, is proved to the satisfaction of the registrar, the registrar may, if he think fit, enter on the register notice of such liabilities, rights, or interests in the prescribed manner.

This section is founded on sect. 27 of the Land Registry Act, 1862. As to "mines and minerals," see sect. 9 of that act.

The list contained in subsections (1), (2), (3) and (7) of this section is practically identical with that contained in subsections (1), (2) and (3) of the 27th section of the same act. The rights

to the surface, and is only applicable where the mines have been separately dealt with . . . It would, therefore, seem that in no case ought the mines and minerals to be expressly included in the registration, unless the registrar is satisfied that such mines and minerals have been demised, worked or enjoyed, either by the owner of the land or under his title for a reasonable period. The act seems to give a discretion to the registrar to include the mines and minerals expressly, if he is satisfied as to their title; and as, if they are not severed from the land, they appear to be registered as part of the land, *whether expressly mentioned or not*, the registrar ought not, it would seem, expressly to include them except upon strict evidence, as, if included, the adverse and intangible rights, if any, relating to mines, to which the 18th section makes all land liable, might be prejudiced, if not destroyed." (Note by the Assistant Registrar, MS. *penes me.*)

mentioned in subsections (4), (5) and (6) have been added to the list given in the Act of 1862.

A reference to sects. 7 and 30 (*supra*) will show that "unless the contrary is expressed on the register," the title of the owner of the fee simple, though registered as "absolute," and that of a purchaser from him for valuable consideration, will be subject to the "liabilities, rights and interests" mentioned in the present section. By sects. 13 and 35, also, "unless the contrary is expressed on the register," the title of the proprietor of leasehold land, although the lessor shall have been declared to have had an absolute title to grant the lease under which the land is held, and also the title of a purchaser from the lessee for valuable consideration, will be subject to such of the liabilities, rights and interests mentioned in the present section as affect the leasehold estate.

In other words, the "liabilities, rights and interests" mentioned in the present section are not, "unless the contrary be expressed on the register," legally affected by the registration; they will continue to attach to the land, even after it has been placed on the register, and although not noticed upon the register (a). It will always be incumbent on a purchaser, even of the fee simple with an absolute title, to inquire, as at present, whether the "liabilities, rights and interests" mentioned in this section exist or not.

(a.) These are very useful enactments. There are no corresponding provisions in the Land Registry Act, 1862 (b). See the form of application to the registrar to notify exemption, Form 31.

(b.) By the 30th General Rule, "any fact not relating to succession duty to be notified on the register under the" present "section shall be entered in or against the registered description of the land, unless the registrar otherwise direct."

By the same General Rule, "any fact relating to succession duty shall be notified on the register in such manner as the registrar shall think fit."

"Owing in respect of such land." The certificate should be so framed as to show that no succession duty is *chargeable* on

(a) Sect. 62 of the Irish act has a similar operation. See Urlin & Key, p. 49.

(b) See sect. 88 of that act, which extends to succession duty. Urlin & Key, p. 104.

the land in respect of any reversionary interest though not strictly "owing" (c).

(c.) The applicant for registration, who desires to register separately the mines or minerals, should allude to them specifically in his application, and show his title to them, affirmatively, in the abstract which he furnishes. See the note to Form 1, in the Schedule of Forms. If the mines or minerals, however, are *not mentioned at all*, they will, by the operation of the present section, be deemed to be included. The ordinary definition of land, which includes everything in and under it, must be taken as its definition for the purposes of the act (d).

By the 30th General Rule, "the entry in the registered description to the effect that the mines and minerals are included in the registration, shall be the registration of the registered proprietor of the land as proprietor also of the mines and minerals, and the mines and minerals shall thenceforth be considered as forming part of and subject to the registered title of the land, unless otherwise noted on the register."

(d.) "In manner hereafter in this act mentioned." This refers to sect. 82 (*infra*), which treats of the registration of "special hereditaments," including "mines or minerals severed from the land."

The proviso at the end of this section, to the effect that the registrar may enter on the register any of the liabilities, rights or interests mentioned in this section, if proved to exist, is founded on a similar proviso attached to the 27th section of the Land Registry Act, 1862. The proviso attached to that enactment is, however, compulsory; the proviso attached to this section is permissive, which seems to be an improvement.

By the 29th General Rule, "every application requiring an entry to be made on the register in respect to any of the liabilities, rights and interests that are by the act declared not to be incumbrances, shall state the particulars of the entry required to be made. The evidence in support of the application shall be

(c) See this explained, Holt on Registration of Title, 62.

(d) Note of the Assistant Registrar, MS. *penes me*. By the 25 & 26 Vict. c. 108, trustees for sale, &c., may dispose of the land without the mines, or of the mines without the land, with the sanction of the Court of Chancery.

left therewith, and, subject to the provisions of the" present "section as to succession duty, the application shall be proceeded with in such manner as the registrar shall direct."

A form of application is given, Form 31.

SECTION 19.

Discharge of Incumbrance.

Where, upon the first registration of any freehold or leasehold land, notice of any incumbrance affecting such land has been entered on the register, the registrar shall, on proof to his satisfaction of the discharge of such incumbrance, notify in the prescribed manner on the register, by cancelling the original entry or otherwise, the cessation of such incumbrance.

This section is founded on sects. 59 and 87 of the Land Registry Act, 1862.

This section provides a useful mode of removing an incumbrance, existing at the time of the original registration, from the register.

Great inconveniences have been found to result in Ireland from incumbrances, though paid off, still remaining on the general registry of deeds, as permanent blots on the title (e).

In South Australia the entry is cancelled by a memorandum of satisfaction written across the page, and signed by the registrar.

By the 27th General Rule it is provided, that "where, upon the first registration of any freehold or leasehold land, notice of an incumbrance affecting such land has been entered on the register, the cessation of which is required to be notified under the" present "section, the applicant shall, in case there has been any dealing with, or transmission of, or interest created or arisen in such incumbrance not appearing on the register, *leave in the office an abstract of his title to make the application, and prove the same in the usual way, and the matter shall be proceeded with in the mode provided in the cases of examination of title*

(e) See Urlin & Key, pp. 74 and 104.

on registration, subject to any special directions of the registrar. Where there has been no dealing with the incumbrance the applicant shall *produce the instrument of incumbrance with a release or receipt thereon signed* by the incumbrancer, whose signature and identity shall be *duly verified*. The registrar, upon being satisfied of the cessation of an incumbrance, shall notify the same by cancelling, where convenient, the original entry, or otherwise by entering on the register the fact of such cessation."

SECTION 20.

Determination of Lease.

The registrar shall, on proof to his satisfaction of the determination of any lease of registered leasehold (f) land, notify in the prescribed manner on the register the determination of such lease.

This section is founded on the analogy of sect. 87 of the Land Registry Act, 1862, but there is no provision made, as in that section, for the cancellation of the lease.

See, as to the registration of leasehold land, sects. 11—16 (*supra*).

By the 27th General Rule it is provided, that "this rule shall, where applicable, extend to applications to notify the determination of any lease of registered leasehold land under the 20th section of the act." As to the 27th General Rule, see the last section.

SECTION 21.

No Acquisition of Title by adverse Possession.

A title to any land adverse to, or in derogation of, the title of the registered proprietor shall not be acquired by any length of possession; but this section shall not prejudice, as against any person

(f) As to the cancellation of notice of any lease of *freehold* land, see General Rule 56, and Holt on Registration of Title, 63.

registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

See, as to "adverse possession," *Nepean v. Doe* and *Taylor d. Athkyns v. Horde*, and the notes to those cases in Smith's Leading Cases, Vol. II. (g).

A marked distinction is established by the latter part of this section between proprietors registered with an absolute or qualified title, and proprietors registered with a possessory title only. If the time, under the Statute of Limitations, had begun to run against the person registered with a possessory title only before the period when he was registered, the time will *continue to run* against him, notwithstanding the registration. This is merely a repetition of what has been already stated in sect. 8. "The registration of any person as first registered proprietor of freehold land with a possessory title only shall not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor, and subsisting or capable of arising at the time of registration of such proprietor."

In the case of persons registered with an absolute or qualified title, although the time may have begun to run prior to the registration, it will, immediately upon the registration, cease to run (*h*) (except, of course, as to interests excepted on the register). This is one great advantage of registering an absolute or qualified title (*i*).

(g) The word "adverse," however, is not used here in a technical sense; it is equivalent to "in derogation of."

(h) With this view (expressed in the 2nd edition of this work) Mr. Holt (writing subsequently) concurs. *Registration of Title*, 64.

(i) Suppose a qualified title for ten years is registered, and five years before the commencement of the ten years time began to run against the person registered; in five years more the title of the person in adverse possession would have become absolute. The registration would appear to prevent time from running any longer, if no notice of the adverse title is placed upon the register.

PART II.

REGISTERED DEALINGS WITH REGISTERED
LAND.*Mortgage of Registered Land.*

SECTION 22.

*Creation of Charges, and Delivery of Certificate
of Charge.*

Every registered proprietor of any freehold or leasehold land may, in the prescribed manner, charge such land with the payment at an appointed time of any principal sum of money, either with or without interest, and with or without a power of sale to be exercised at or after a time appointed. The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge, and of the power of sale, if any; the registrar shall also, if required, deliver to the proprietor of the charge a certificate of charge in the prescribed form.

This section is founded on the recommendations of the Royal Commission on Registration of Title, 1857 (*h*):—"We think that the benefits to be derived from registration should be extended to the owners of charges upon the fee of land as fully as to the owners of the fee itself." And again: "Charges on the fee being (apart from the fee) subjects of marketable dealing, and interests commonly bought and transferred, should be admitted on the register, separate places being provided for them" (*l*).

(*h*) Para. LXXVI., p. 41 of Report.

(*l*) Report, p. 25, para. XLIV.

The Land Registry Act, 1862, provided for the keeping of a book, entitled "The Register of Incumbrances" (*m*), in which was to be entered, under the same number as that in the "Record of Title," an account of all the charges and incumbrances affecting the land, or any part of it, existing at the date of the registration of the land; and every mortgage or charge created after the registration of the land was to be entered up in this Register of Incumbrances.

The majority of the Land Transfer Commissioners of 1869 were opposed to the scheme of registration of charges, propounded by the Royal Commission of 1857. The effect of the adoption of their views would have been to make the mortgagee a mere "cautioner" (sects. 60, 64, *infra*).

Mr. Walpole was a member of both the Royal Commissions of 1857 and 1869, and he adhered in 1869 to the opinion which he expressed in the report of 1857, that a registration of charges would be beneficial. Lord Justice Giffard and he subscribed the following dissent (*n*) from the report of 1869:—

"It appears to us that a subordinate registration of mortgages is quite as important as the registration of title to the absolute owners or to beneficial lessees, and we cannot therefore concur in the recommendation that all partial interests other than beneficial leases should be kept off the registry."

Mr. Wolstenholme also dissented from the report of 1869 (*o*):—

"The only system of registration which, as I think, can be adopted with advantage and a chance of success, is one similar to that recommended by the report of 1857, on which Lord Cairns' bills were founded. There should be a register of owners of charges on land; no owner of less than the entire interest in the gross or annual sum charged to be admitted on the register, and the receipt of every person entered on the register as owner of a charge to free the land from the charge. With a register of mortgages every mortgage may be made as secure as the first, and great facility given for dealing with lands."

(*m*) 25 & 26 Vict. c. 53, s. 14.

(*n*) P. XLVI. of Report.

(*o*) PP. XLIV. and XLV. of Report.

One of the most distinguished members of the Land Transfer Commission, 1869, was Mr. Thring, now Sir Henry Thring, K.C.B., the Parliamentary Counsel, to whose able drafting the simplicity and lucid arrangement of the present act is largely due (*p*). He dissented from the report: "The facility which a register of title would afford for charging land seems to me one of the greatest benefits that such a register would confer upon the public" (*q*).

Among the Land Transfer Commissioners was the late eminent conveyancer, Mr. Jacob Waley, who also dissented from the report (*r*):—

"In my opinion the adoption of a register of charges will be attended with material advantage on the following grounds:—

- "1. It will by this means be practicable for a person to make a mortgage without parting with the character of registered owner of his estate. The security and powers of the mortgagee will be sufficient in respect of his being registered owner of the first charge, without his requiring also to be registered owner of the estate.
- "2. The registration of charges will admit of the introduction, in the place of mortgages, of charges with statutory incidents taking effect according to their priorities, transferable with the utmost facility, and not involving the necessity of a re-conveyance when paid off, so as much to abridge and simplify the conveyancing connected with mortgage transactions.
- "3. The registration of charges will give great facility, when there are incumbrancers, for dealing with purchase-money without payment into court."

It will be perceived that the present section enables charges

(*p*) Mr. Dart, in the 5th edition of his *Treatise on the Law of Vendors and Purchasers*, observes (p. 1170): "The Act will probably achieve a greater success than that achieved by its predecessors, but less than that which would be commensurate with *the ability and labour with which it has been framed.*" See also, Holt on Registration of Title, 25.

(*q*) Report, p. XLIII.

(*r*) Report, pp. XL. and XLIII.

upon leaseholds to be registered. This appears to be an extension of the principle of registering charges laid down by the Royal Commission of 1857, who only mention registration of "charges upon the fee."

The 20th General Rule contains the following provisions respecting charges of registered land :—

"The instrument by which any charge of freehold or leasehold land shall be made under the 22nd section of the act shall be left in the office, and the execution thereof by the registered proprietor of the land shall be attested by a solicitor and duly verified. And where it is desired that an *entry* should be made *on the register negating the implied covenants* referred to in the 23rd and 24th sections of the act, or that any entry should be made on the register, contrary to *the powers given* to a registered proprietor of a registered charge by the 25th, 26th, and 27th sections respectively, or contrary to the provisions of the 28th section as to the priority of registered charges, the application to be made in that behalf shall state the particulars of the entry required to be made, and shall be signed and the signature attested and verified in the same manner as is required with respect to the execution of the instrument of charge. Such verification may, where practicable, be made by the same declaration as that verifying the execution of the instrument of charge.

"Where a *part only* of the registered land is comprised in the instrument of charge, the part so charged shall be described in like manner as is provided by Rule 23 with reference to a transfer of part of registered land; and in the event of a foreclosure or sale being enforced by the registered proprietor of the charge all the provisions of the said rule shall, so far as the nature of the case may require, be applicable thereto."

The 20th Form in the Schedule of Forms contains the simple statutable form of instrument of charge, which is not even under seal. The entry on the register supersedes it (s).

(s) It may be destroyed, under Rule 43, as soon as the charge has been completed by the entry on the register. See Holt on Registration of Title, 65.

The last part of the second clause of the present section is founded on the recommendation of the Royal Commission on the Registration of Title, 1857 (t): "A certificate of the charge shall be given by the registrar to the party applying to register the same."

"In the prescribed form." By the 33rd General Rule, "every application for a certificate of charge shall be made by the registered proprietor entitled to have and requiring the same. A certificate of charge shall be under the seal of the office, and may, at the option of the applicant, contain either a copy of the entry on the register of such charge, with a reference to or a copy of the registered description of the land, or the same particulars as a land certificate."

The form of application for a certificate of charge is given in Form 36. The fee for the certificate of charge is 5s.

SECTION 23.

Implied Covenant to pay Charges.

Where a registered charge is created on any land there shall be implied on the part of the person being registered proprietor of such land, at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negating such implication, a covenant with the registered proprietor for the time being of the charge to pay the principal sum charged, and interest, if any, thereon, at the appointed time and rate; also a covenant, if the principal sum or any part thereof is unpaid at the appointed time, to pay interest, half-yearly at the appointed rate, on so much of the principal sum as for the time being remains unpaid.

See the 20th General Rule, cited under the last section, as to

(t) Para. LXXVI., § 4; p. 41 of their Report.

the application to be made by a trustee or other person for an entry on the register negating this implied covenant.

The Royal Commission on the Registration of Title, 1857, recommended, that "On the registration of the charge the registered ownership will be *subject to the legal rights and powers incident to the charge*, and either may be transferred independently of the other" (u). It will seem that this recommendation has been very carefully and minutely carried out in the present and four following sections (x).

SECTION 24.

Implied Covenant in case of Leaseholds to pay Rent, &c., and indemnify Proprietor of Charge.

Where a registered charge is created on any leasehold land there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negating such implication, a covenant with the registered proprietor for the time being of the charge, that the person being registered proprietor of such land at the time of the creation of the charge, his executors, administrators, and assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the pro-

(u) Para. LXXVI, § 3; p. 41 of Report.

(x) The reader is referred to the volumes of Davidson's Conveyancing, relating to "Mortgages," and to Fisher on Mortgages, for such further information (if any) as he may require respecting "the legal rights and powers incident to" mortgages.

A provision (copied from the Land Registry Act, 1862) for creating equitable mortgages by a deposit of the land certificate will be found in sect. 81 (*infra*).

prietor of the charge, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims, on account of the non-payment of the said rent, or any part thereof, or the breach of the said covenants or conditions, or any of them.

See the 20th General Rule, cited under the 22nd section, as to the application to be made by a trustee (y) or other person for an entry on the register negating this implied covenant.

SECTION 25.

Entry by Proprietor of Charge.

Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him under the charge, at any time during the continuance of his charge, enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof, subject nevertheless to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession.

See the 20th General Rule, cited under the 22nd section, as to the application for an entry on the register contrary to this power.

SECTION 26.

Foreclosure by Proprietor of Charge.

Subject to any entry to the contrary on the register, the registered proprietor of a registered

(y) As to trustees so applying, see Holt on Registration of Title. 67, 78.

charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time.

See the 20th General Rule, cited under the 22nd section, as to the application for an entry on the register contrary to this power.

SECTION 27.

Remedy of Proprietor of Charge with a Power of Sale.

Subject to any entry to the contrary on the register, the registered proprietor of a registered charge with a power of sale may, at any time after the expiration of the appointed time, sell and transfer the land on which he has a registered charge, or any part thereof, in the same manner as if he were the registered proprietor of such land,

See the 20th General Rule, cited under the 22nd section, as to the application for an entry on the register contrary to this power.

SECTION 28.

Priority and Discharge of Registered Charges.

Subject to any entry to the contrary on the register, registered charges on the same land shall, as between themselves, rank according to the order in which they are entered on the register, and not according to the order in which they are created.

The registrar shall, on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify on the register in the prescribed manner, by cancelling the original entry or otherwise, the cessation of the charge, and thereupon the charge shall be deemed to have ceased.

See the 20th General Rule, cited under the 22nd section, as to the application for an entry on the register, contrary to provisions of this section as to priorities.

The first clause of this section is founded on the recommendation of the Royal Commission on Registration of Title, 1857 (z): "The priorities of all charges shall be determined exclusively according to the dates of their respective registration."

The provision contained in the second clause for cancelling the entry of registered charges effected subsequently to the registration of the land, is similar to that contained in sect. 19 for cancelling on the land registry the entry of incumbrances affecting the land at the time of its first registration. No release is necessary. Mr. Waley recommended, that "the register of charges should record *existing* incumbrances only, those which have been discharged being (as was the case under the Land Transfer Act, 1862) erased from the register."

By the 22nd General Rule, "Where the cessation of a charge entered on the register is required to be notified under the 28th section of the act, the application shall be signed by the registered proprietor of the charge, or a registered proprietor interested in the land, and shall be attested by a solicitor and duly verified. If the application is not signed by the registered proprietor of the charge, due proof shall be left with the application of the satisfaction of the charge. The registrar, upon being satisfied of the cessation of a charge shall, where convenient, notify the same by cancelling the original entry, or shall otherwise enter on the register the fact of such cessation." The form of application is given in Form 22.

(z) Para. LXXVI., § 5; p. 41 of their Report.

Transfer of Freehold Land.

SECTION 29.

Transfer of Freehold Land, and Delivery of Land Certificate.

Every registered proprietor of freehold land may, in the prescribed manner, transfer such land or any part thereof. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the land.

Upon completion of the registration of the transferee the registrar shall, if required, deliver to him a land certificate in the prescribed form; he shall also, in cases where part only of the land is transferred, if required, deliver to the transferor a land certificate, containing a description of the land retained by him.

This section is founded on paragraph LXXV. of the Report of the Royal Commission on Registration of Title, 1857(a). The closeness with which the recommendations of that report are followed will appear from a comparison of the second clause of this section with the following passage in paragraph LXXV. : "On the completion of the transfer the registrar will deliver to the transferee a fresh certificate of registered ownership, if the whole of the registered land has been transferred; but if the transfer is confined to a part, he will deliver to a transferee a certificate of ownership limited to such part, and he will deliver to the transferor a certificate of ownership containing a description of the lands retained by him."

"In the prescribed manner." By the 23rd General Rule, "the instrument by which any transfer of land shall be made under the present section shall be left in the office, and the

(a) Pages 40, 41 of the Report.

execution thereof by the registered proprietor shall be attested by a solicitor and duly verified. The land shall be described by reference to the registered description, and *where a part only* of the registered land is *comprised in the transfer* an extract or copy on tracing linen of or from the public map referred to in such registered description, with a reference where necessary to a revision and enlargement of such extract, to be made on tracing linen delineating the land transferred and defining its locality, with reference to the land retained, shall be referred to in the instrument of transfer, and annexed thereto, and shall be referred to in and form part of the registered description of the part transferred. The provision of Rule 3, as to the extract there referred to, shall apply to the extract required by this rule, and unless such last-mentioned extract shall be conveniently removable for annexation to the register a duplicate thereof shall be left for the purpose. A note shall be made on the registered description of the land retained, referring to the part disposed of. The registrar may, if he so think fit, require that the extract from the public map, referred to in the instrument of transfer of part of registered land, be verified by declaration, or otherwise, as he may direct."

It has been suggested that, before dealing with registered land, a *special condition* should be prepared (b).

By the 33rd General Rule it is provided, that "a land certificate to the transferor under the 29th section may, if the registrar shall so think fit, consist of his subsisting land certificate, if any, altered to correspond with the register, and certified accordingly;" and that "no new land certificate shall be issued under the 29th section to the same proprietor unless the old certificate is delivered up."

The four dispositions authorized by sect. 63 of the Land Registry Act, 1862, are provided for in their order by the sections which follow. The 1st mode by sects. 64—67; the 2nd by sects. 68—72; the 3rd by sect. 73; and the 4th by sect. 74 (c).

It is not a little curious that some serious blunders should

(b) See the reasons assigned, Holt on Registration of Title, p. 161.

(c) Ayrton on the Land Transfer Act, 1862; p. 209.

have crept into the old statutory forms. Thus all of them are expressed to be "signed and sealed," but not delivered. "It is presumed, however, that delivery is not intended to be dispensed with" (d). Again, in the "form of transfer by indorsement," the words "and his heirs" are omitted after the name of the transferee, so that the transferee would only take *an estate for life*. These are melancholy illustrations of a too hasty attempt at reform. "The prescribed manner" will, at all events, be free from these legislative pitfalls. No deed is required; and the official printed forms, 23 or 24, can be filled up in writing. They will be superseded by the entry by the registrar on the registry of the transferee as proprietor. The instrument of transfer may then be cancelled under General Rule 43. The transfer is incomplete till the entry is made.

SECTION 30.

Estate of Transferee for Valuable Consideration of Freehold Land with Absolute Title.

A transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:

- (1.) To the incumbrances, if any, entered on the register; and
- (2.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this act declared not to be incumbrance, but free from all other estates and interests whatsoever, including estates and interests of her Majesty, her heirs and successors.

A comparison of this section with sect. 7 will reveal the very important fact that, in stating the liabilities to which the trans-

(d) Umlin & Key, p. 80.

ferree is subject, sub-sects. (1) and (2) of sect. 7 are retained, while *subs-sect. (3) is omitted*. This raises the question, how does the transferee come to have a clearer title than the first registered proprietor? The answer will be found in the Report of the Royal Commission on Registration of Title, 1857 (*e*), from which the framers of this measure appear to have drawn inspiration more freely than from any other source:—

“As regards the sale and transfer of land it is clear that much good would not be obtained by merely registering the fee, or, in other words, the legal title, unless the purchaser could dispense with inquiry into the equitable title, with its incidents. Unless a purchaser be protected from inquiry into trusts, there will not be any advantage to him. In other words, if trusts and limitations are to continue to form part of the title in all respects as they now do, the registry of title will be useless, or at least not worth the danger and difficulty attendant upon the introduction of a new system.

“*Equitable interests cannot, consistently with the objects to be attained by registration of title, bind or affect the ownership of a registered proprietor (f), unless such interests are of his own creation; but they may be allowed to confer a right against the land whilst in the possession of the owner who created the trusts, and in that of his representatives, or volunteers claiming under him. When the land is sold without fraud the equities and trusts must be transferred to the funds arising from the sale, and so THE PURCHASER WILL TAKE THE LANDS DISCHARGED OF THE TRUSTS.* But they may be protected on the register of title by the trustee of the family settlement, or by a trustee to be named by the Court of Chancery. *Sales by the settlor or the trustee in contravention of the trusts may be prevented by entering an inhibition or caveat.* Thus the existing system of settlements by which the limitations of the settlement modify and become part of the title, will be unchanged under a registry of title, so long as the land continues in the possession of the settlor or volunteers claiming

(*e*) Para. L., pp. 29—32 of the Report.

(*f*) The Report says “purchaser,” but this is evidently meant for “proprietor.”

under him, or the trustees of the settlement. Upon a sale without fraud, these limitations and trusts will attach to the funds arising from the sale."

The Commissioners then proceed to show that, under the existing system, care is always taken to provide that the purchaser should not be obliged to see to the application of the trust moneys, and that the trustees should be able to give good discharges. Property, too, is often conveyed to the trustees by one deed, while the trusts are declared by another. And what is the object of these complicated proceedings, except that the trustees may appear to the purchasers, or be treated by them, as absolute owners? Nor should it be forgotten that there are millions of money in the funds, and in railways, canals, docks, and other undertakings, left to a great extent in the names of trustees, and yet it has been found that property so circumstanced is practically safe.

A comparison of sect. 83 (1) of this act with sect. 33 of the Land Registry Act, 1862, would seem to show that an enormous amount of labour will be saved by the application of the simple principles laid down by the Commissioners of 1857 in the passage just cited, principles which appear to have been entirely ignored in the act of Lord Westbury.

A recent work of authority (*g*), commenting on subsection (3) of section 7, observes:—

"Upon a transfer by the registered proprietor for valuable consideration a purchaser would take the land discharged from all" the "equities and claims" specified in the sub-section; "and such a transfer could only be prevented by cautions, inhibitions or restrictions entered upon the register." The passage cited above from the Report of the Royal Commission on Registration of Title, 1857, is then given in support of this view.

In a note to the present section, however, the writer of the work in question thus qualifies his previous opinion:—

"Although there is nothing in this section answering to sub-sect. (3) of sect. 7, it can hardly be contended that, in the case of a trustee purchasing land with his trust moneys, and taking a transfer to himself as registered proprietor, or in similar cases,

(*g*) Holt on Registration of Title, 45.

the land, whilst in the hands of the trustee, would not be liable to the claims of his *cestui que trusts*. It is no object of an indefeasible title to defeat in favour of the registered owner rights created by himself, or to which he was personally subject prior to his registration, or to destroy, as between trustee and *cestui que trusts*, the familiar maxim of equity, 'once a trustee always a trustee.' What the act does is to secure a transferee for value against all unregistered claims, except such as are created by himself, and to enable him to transfer the land for value free also from these latter claims. Further than this, it seems hardly possible to make any title indefeasible" (h).

Assuming that a *cestui que trust* can be correctly described as "claiming under" the trustee, and the trustee as having "created the trust," the above passage appears to go the length of saying, that "although there is nothing in this section answering to sub-sect. (3) of sect. 7," this section is to be read as if sub-sect. (3) of sect. 7 had been inserted in it,—a rather doubtful construction, considering that the 3rd sub-section of sect. 7 has evidently been deliberately, and for a definite purpose, omitted by the legislature from this section.

But a *cestui que trust* very seldom "claims under" his trustee: a trustee has very seldom "created" the claim of his *cestui que trust*; he is usually a mere nominee of the settlor. Even if sub-sect. (3) of sect. 7 had been inserted in this section, it is submitted that the *cestui que trust* would, in the case of a purchase by the trustee of land out of the trust moneys, be obliged to protect his interests by cautions, inhibitions or restrictions entered on the register, or by unregistered dealings.

It is clear that no notice of the trust in question could appear upon the register. (Section 83 (1).)

But the act does not *destroy* trusts, in the case of a *bonâ fide* transfer for value—it merely *ignores* them. It may be added, that it is usually made a condition of the investment of trust moneys in land, that the *cestui que trust* shall have given his consent; and this consent would, of course, be withheld if the investment were not a safe one, or if there were any apprehension that the trust would be effaced.

(h) Holt on Registration of Title, 71.

It will be perceived that the language of the Commissioners of 1857 applies to fraudulent *sales* by trustees, not to fraudulent *purchases* by them; but it is submitted that the same principle is applicable to both. The trust will not appear upon the register, and the *cestui que trust* must protect himself by cautions, restrictions and inhibitions.

SECTION 31.

Estate of Transferee for Valuable Consideration of Freehold Land with qualified Title.

A transfer for valuable consideration of freehold land registered with a qualified title shall, when registered, have the same effect as a transfer for valuable consideration of the same land registered with an absolute title, save that such transfer shall not affect or prejudice the enforcement of any right or interest appearing by the register to be excepted.

See sect. 9 and the note thereto.

SECTION 32.

Estate of Transferee for Valuable Consideration of Freehold Land with possessory Title.

A transfer for valuable consideration of freehold land registered with a possessory title, shall not affect or prejudice the enforcement of any right or interest adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor; but, save as aforesaid, shall, when registered, have the same effect as a transfer for valuable consideration of the same land registered with an absolute title.

See sect. 8 and the note thereto.

SECTION 33.

Estate of Voluntary Transferee of Freehold Land.

A transfer of freehold land made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests, or equities subject to which the transferor held the same; but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same land for valuable consideration.

This is in accordance with the views of the Royal Commission on the Registration of Title, 1857 :—"Equitable interests and trusts" of the registered owner's "own creation" "may be allowed to confer a right against the land," whilst in the possession of *volunteers claiming under him*. The effect of this section is to subject the voluntary transferee from the first registered owner to the same equities to which under sub-sect. (3) of sect. 7 the first registered owner was subject (i).

See note to sect. 30, *supra*.

Transfer of Leasehold Land.

SECTION 34.

Transfer of Leasehold Land, and Delivery of Office Lease.

Every registered proprietor of leasehold land may, in the prescribed manner, transfer the whole

(i) Mr. Holt observes: "A voluntary transferee would be entered on the register in the same terms as a transferee for value, and it would seem that his transferee for value would, upon being registered, take indefeasibly."—Registration of Title, 73.

of his estate in such land or in any part thereof. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the land.

Upon completion of the registration of the transferee, if the transfer includes the whole of the land comprised in the registered lease relating to such land, the transferee shall be entitled to the office copy of the registered lease; but if a part only is transferred, the registrar shall, if required, according to any agreement that may have been entered into between the transferor and transferee, deliver to the one the office copy of the registered lease and to the other a fresh office copy of such lease, each of such copies showing by endorsement or otherwise the parcels of which the person to whom such copy is delivered is the registered proprietor.

"In the prescribed manner." See the 23rd General Rule (cited under rule 29, *supra*), which applies to the transfer of leaseholds under this section as well as to the transfer of freeholds under the 29th section.

This section is framed upon the analogy of sect. 29, *supra*, the necessary alterations being made to adapt it to leaseholds:—"The mode of transferring registered leaseholds will be similar in all respects, *mutatis mutandis*, to the mode of transfer of the registered ownership" (*k*). See, as to the "office copy of the registered lease," sect. 16, *supra*, and sects. 78—81, *infra*.

By the 34th General Rule, "where a fresh office copy is required under the" present "section, in addition to such of the particulars provided by the 16th section, and this rule to be endorsed on an office copy or annexed thereto, as in the registrar's opinion may be applicable, there shall be annexed to such

(*k*) Report, 1857, p. 42.

fresh office copy and referred to in an endorsement thereon a copy of the map referred to in the registered description of the part transferred, showing the part so transferred, and an endorsement shall be made on the office copy of the part retained, showing the part disposed of by reference to its registered description, or otherwise."

SECTION 35.

Estate of Transferee for Valuable Consideration of Leasehold Land with a Declaration of absolute Title of Lessor.

A transfer for valuable consideration of leasehold land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held shall, when registered, be deemed to vest in the transferee the possession of the land transferred for all the leasehold estate described in the registered lease relating to such land, with all implied or expressed rights, privileges, and appurtenances attached to such estate, but subject as follows:

- (1.) To all implied and express covenants, obligations, and liabilities incident to such estate; and
- (2.) To the incumbrances (if any) entered on the register; and
- (3.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests as affect the leasehold estate and are by this act declared not to be incumbrances in the case of registered freehold land;

but free from all other estates and interests whatsoever, including estates and interests of her Majesty, her heirs and successors.

It will be perceived that sub-sect. (4) of sect. 13 is omitted,

just as sub-sect. (3) of sect. 7 was omitted in sect. 30, *supra*. See the note to that section, and the passage cited in the note to sect. 34, from the Report of the Royal Commissioners on Registration of Title, 1857.

SECTION 36.

Estate of Transferee for Valuable Consideration of Leasehold Land with a Declaration of Qualified Absolute (sic) Title of Lessor.

A transfer for valuable consideration of leasehold land registered with a declaration that the lessor had a qualified title to grant the lease under which the land is held shall, when registered, have the same effect as a transfer for valuable consideration of the same land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held, save that such transfer shall not affect or prejudice the enforcement of any right or interest appearing by the register to be excepted from the effect of registration.

See sect. 15, *supra*, and the note thereto.

SECTION 37.

Estate of Transferee for Valuable Consideration of Leasehold Land without a Declaration of Title of Lessor.

A transfer for valuable consideration of leasehold land registered without a declaration of the title of the lessor shall not affect the enforcement of any estate, right, or interest affecting or in derogation of the title of the lessor to grant the lease under which the land is held; but, save as aforesaid, shall, when registered, have the same effect as a transfer for valuable consideration of

the same land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held.

See sect. 14, *supra*.

SECTION 38.

Estate of Voluntary Transferee of Leasehold Land.

A transfer of leasehold land made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests, or equities, subject to which the transferor held the same; but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same land for valuable consideration.

See sect. 33, *supra*, and the note thereto.

SECTION 39.

Implied Covenants on Transfer of Leasehold Estates.

On the transfer of any leasehold land under this act, unless there be an entry on the register negating such implication, there shall be implied as follows: that is to say,

- (1.) On the part of the transferor a covenant with the transferee, that, notwithstanding anything by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease,

and on the part of the lessee to be paid, performed, and observed, have been so paid, performed, and observed up to the date of the transfer; and

- (2.) On the part of the transferee a covenant with the transferor, that he, the transferee, his executors, administrators, or assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the transferor, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims on account of the nonpayment of the said rent or any part thereof, or the breach of the said covenants or conditions, or any of them.

These are usual covenants in an assignment of leaseholds.

"Unless there be an entry negating such implication." By the 24th General Rule, "every application requiring an entry to be made on the register negating the implied covenants referred to in the" present "section, shall state the particulars of the entry required to be made, and shall be signed, attested, and verified in the same manner as is required with respect to the execution of the instrument of transfer. Such verification may, where practicable, be made by the same declaration as that verifying the instrument of transfer" (*k*).

(*k*) As to trustees requiring such an entry, see Holt on Registration of Title, 67, 78.

Transfer of Charges.

SECTION 40.

Transfer of Charges on Register.

The registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred; the registrar shall also, if required, deliver to the transferee a fresh certificate of charge, but the transferor shall be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof.

"The mode of transferring registered charges," observe the Royal Commission of 1857 (1), "will be similar in all respects, *mutatis mutandis*, to the mode of transferring the registered ownership."

The present section carries out this recommendation.

By sect. 49, *infra*, it is provided that the registered proprietor alone shall be entitled to charge registered land by a registered disposition, and to transfer such registered charge by a registered conveyance; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in registered land.

By the 21st General Rule, "the instrument by which any transfer of charges shall be made under the 40th section of the act shall be left in the office, and the execution thereof by the registered proprietor of the charge shall be attested by a solicitor and duly verified."

See the statutory form of instrument in the schedule of forms, Form 21. See also Form 36, as to the form of application for a certificate of charge.

Transmission of Land and Charges (m).

SECTION 41.

Transmission on Death of Freehold Land.

On the death of the sole registered proprietor, or of the survivor of several joint registered proprietors of any freehold land, such person shall be registered as proprietor in the place of the deceased proprietor or proprietors as may, on the application of any person interested in the land, be appointed by the registrar, regard being had to the rights of the several persons interested in such land, and, in particular, to the selection of such person as may for the time being appear to the registrar to be entitled according to law to be so appointed (*n*), subject to an appeal to the court in the prescribed manner by any person aggrieved by any order of the registrar under this section.

This section is based on section 78 of the Land Registry Act, 1862, the language of which, in effect, authorizes the appointment of a *real representative* in the case of freehold land (*o*).

A warm controversy raged round this section in the House of Commons. The heir or devisee, the executor or administrator, "the person or persons, not being under the age of twenty-one years, or of unsound mind, having a right to an estate in fee in

(*m*) By the 5th General Rule, "in the case of death or transmission, or change of interest *pending registration*, the proceedings therein shall not abate, but shall, subject to the provisions of the act and of these rules, be available to such person as the registrar on application, having regard to the rights of the several persons interested in the land, may direct, if such person think proper to adopt the same."

(*n*) "Where the deceased proprietor was entitled for his own benefit, the *devisee* or *heir* will, apparently, be entitled to be registered in his place."—Holt on Registration of Title, 79.

(*o*) Urlin & Key, 97.

the land," the "person appearing to the registrar to be entitled according to law," all had their claims advocated.

The last-mentioned claim (*p*) was practically admitted by the Attorney-General, who, in Committee, moved the insertion of the words, "regard being had to the rights of the several persons interested in the land, and in particular to the selection of such person as may for the time being appear to the registrar to be entitled according to law to be so appointed."

The recommendation of the Royal Commission of 1857 was as follows (*q*):—"Upon the death of any registered owner, a real representative should be appointed, upon whom the registered ownership shall devolve. This representative will be ordinarily *the executor* (?); but when an executor has not been named, or when he has died, or renounced probate, power will be given to the parties interested to apply to the registrar or a judge to supply the place of the deceased registered owner, and to enter the name of *some proper person* in his stead."

The Land Transfer Commissioners, 1869, advised that "when the registered owner dies, a representative" (the marginal note says, "real" representative) "shall be entered in his stead. This will either be his *executor*, or some person agreed on by persons interested in the registry, or appointed by the Court of Chancery" (*r*).

It is preferable that the selection should be left to the registrar in the first instance.

The form of application under this section will be found in the schedule of forms, Form 27.

By the 26th General Rule, "every application under the 41st, 44th, 45th, or 52nd sections of the act shall be supported by the *declaration of the applicant and his solicitor*, showing concisely the existing rights of the several persons interested in the land or charge affected by the application. *The evidence* in support of the application shall be *left therewith in the office*, and the registrar may require such other evidence, if any, and such notices to be given as he may think fit, and the matter

(*p*) Advocated by Mr. Dodds, M.P. for Stockton.

(*q*) Para. LXX. p. 38.

(*r*) Report, para. XXVIII.

This section is skilfully worded, so as to follow as closely as possible the existing law relative to a husband's interest in his wife's freeholds.

"In the prescribed manner." See General Rule 59.

See sect. 52, *infra*, as to registration of notice of estates by the curtesy of England.

See sect. 87, *infra*, as to married women.

See, as to the husband's interest in the wife's real estate, Macqueen's Law of Husband and Wife, c. 1, s. 3 (2nd ed., 1872).

See General Rule 26, cited under sect. 41, and Form 27.

SECTION 45.

Effect of Marriage of Female Proprietor of Leasehold Land or Charge.

The husband of any female registered proprietor of leasehold land or of a charge may apply to be registered as proprietor in her place.

"The husband may apply" was substituted, at the instance of Mr. Gregory, for "the husband shall be entitled."

"See, as to the interest of a husband in his wife's leaseholds, Bright's "Law of Husband and Wife," c. viii. s. 1; Macqueen's Law of Husband and Wife, c. 1, s. 2.

See General Rule 26, cited under sect. 41, and Form 27.

SECTION 46.

Nature of Title of Registered Fiduciary Proprietor.

Any person registered in the place of a deceased or bankrupt proprietor shall hold the land or charge, in respect of which he is registered, upon the trusts and for the purposes to which the same is applicable by law, and subject to any

unregistered estates, rights, interests, or equities subject to which the deceased or bankrupt proprietor held the same; but, save as aforesaid, he shall in all respects, and, in particular, as respects any registered dealings with such land or charge, be in the same position as if he had taken such land or charge under a transfer for a valuable consideration (t).

The fiduciary proprietor stands, in effect, in a position very similar to that of a voluntary transferee, the "save as aforesaid" making all the difference between a volunteer and a purchaser for value. See sects. 33 and 38, *supra*.

SECTION 47.

Evidence of Transmission of Registered Proprietorship.

The fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, shall be proved in the prescribed manner.

"The prescribed manner." By the 25th General Rule, "where it is required to prove the fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, the application shall state the fact to be proved, and the nature of the evidence in support thereof. The evidence shall be left in the office with the application, and the fact shall be proved to the satisfaction of the registrar, and the matter shall be proceeded with as he shall direct."

See Form 26.

(t) In Mr. Holt's opinion, the registered transferee for value from the registered fiduciary proprietor would take indefeasibly.

SECTION 48.

Repeal and Re-enactment (with Amendments) of 37 & 38 Vict. c. 78, s. 5; not to apply to Registered Lands.

Section five of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this act, except as to anything duly done thereunder before the commencement of this act; and, instead thereof, be it enacted, that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of the Vendor and Purchaser Act, 1874, shall not apply to lands registered under this act.

The object of the legislature in passing the 5th section of the Vendor and Purchaser Act, 1874, was to obviate the difficulties which arose in getting in the estate of a bare trustee, when it had vested in an infant heir. The 5th section provided that the estate of the bare trustee should vest, not in his heir, but in his legal personal representative, who is necessarily an adult (*u*). Doubts, however, were raised as to the meaning of the section. It was contended that its scope was wider than this, and that if the bare trustee devised the estate, the section took it out of his devisee and vested it in his legal personal representative.

In the first edition of the present work the doubts thrown upon the meaning of the 5th section of the Vendor and Purchaser Act, 1874, were stated, and an attempt was made by the writer to explain them away. These doubts, however, appeared to be endowed with a remarkable vitality. On October 24th,

(*u*) See the note to sect. 4 of the Vendor and Purchaser Act, 1874, *supra*.

1874, Mr. Hall, in the *Law Journal* (*x*), stated, that "Section 5 seems to enact a new rule of law, whereby, on the death of a bare trustee, seised in fee simple, testacy or intestacy is unimportant, operation being denied to a devise or professed devise of the legal estate." And on October 31st, 1874, a correspondent of the *Solicitors' Journal* (*y*) asked:—"Does the act take away the power of devising the trust estate?" Eight months afterwards, on the 10th of July, 1875, a correspondent (*z*) of the *Law Times* (*a*) inquired:—"Section 5 of the Vendor and Purchaser Act, 1874, vests the estate of a bare trustee in the legal personal representative of such trustee: Does this do away with the necessity of a devise of trust estates in a will?"

The writer received several communications from country practitioners calling his attention to the uncertainty introduced into the law of the devolution of real estate by this section. It was intimated that it has been found necessary to get the devisee, the heir, and the legal personal representative, to join in the conveyance of the bare trustee's estate, in order to avoid any question in the future as to the devolution of the estate. The section says "shall," not "may" vest, and is therefore compulsory, not permissive, effectuating a complete change in the law of the devolution of a bare trustee's estate. Uncertainty would have been introduced into titles, if the doubts were not cleared up. The writer accordingly placed on the notice paper of the House of Commons an amendment to the section, the effect of which was to insert "intestate as to" after the words "bare trustee," in lieu of the word "of." This amendment was carefully redrafted by Sir Henry Thring, the Parliamentary Counsel, and was accepted by the Attorney-General (*b*), when the writer moved it upon the report.

The words "as to" after "intestate" are important. A bare trustee might devise all his estates except his bare trust estates. If he died "intestate as to" the bare trust estate, though other-

(*x*) Vol. ix., No. 458, Oct. 24th, 1874.

(*y*) Vol. xviii., No. 53, Oct. 31st, 1874.

(*z*) "Y."

(*a*) Vol. lix., No. 1684, p. 197, "Notes and Queries on Points of Practice."

(*b*) Sir Richard Baggallay, now a Justice of Appeal.

wise testate, that will be sufficient to let in the legal personal representative, and make him competent to convey a good title to the estate of the bare trustee.

The proviso at the end of the present section is copied from a similar clause inserted at the end of the 5th section of the Vendor and Purchaser Act, 1874, by the House of Lords, but subsequently omitted in the Commons, when the Land Titles and Transfer Bill of 1874 was dropped:—"The provision shall not extend to any hereditaments the title to which shall have been registered under the Land Titles and Transfer Act, 1874."

The saving clause contained in this section, "except as to anything duly done thereunder before the commencement of this act," was inserted to protect, *e. g.*, a *bonâ fide* conveyance of the bare trustee's estate by the *legal personal representative* of the bare trustee, in any case in which the bare trustee had, during the interval between the passing of the Vendor and Purchaser Act, 1874 (7th August, 1874), and the commencement of the Land Transfer Act, 1875 (1st January, 1876), died *testate* as to the bare trust estate. Such a conveyance would otherwise, it is submitted, have run the risk of being invalidated, on the ground that the 5th section of the Vendor and Purchaser Act, 1874, left the estate in the *devisee*, who, and not the legal personal representative, was therefore the person to convey. It was all the more necessary that some such saving clause should be inserted, because the 48th section of the Land Transfer Act, 1875, is, in effect, *declaratory* of the meaning of the 5th section of the Vendor and Purchaser Act, 1874, and merely amplifies it, for the purpose of making that meaning, which it always had, clear.

The words "instead thereof" evidently point to the *substitution* of the 48th section of the Land Transfer Act, 1875, for the 5th section of the Vendor and Purchaser Act, 1874, at all events upon and after the 1st January, 1876.

Since the present act was passed, a case has occurred in which one of the most respected judges of the Chancery Division of the High Court is reported to have given a decision, which practically defeated, *pro tanto*, the intention of the legislature in passing this section. The case was that of *Christie v. Ovington*,

and was decided on December 20th, 1875. The suit was one before Sir Charles Hall, V.-C., for a declaration of the rights of persons interested in the fee simple of real estate and for partition or a sale.

The plaintiff, who was the owner of one moiety of the estate, had become the purchaser of the other, and the purchase-money had been paid into court. Between the date at which the Vendor and Purchaser Act, 1874 (7th August, 1874), came into operation and the date of the hearing on further consideration, the surviving trustee of the moiety which the plaintiff had purchased died intestate and no person would take a grant of letters of administration. A question arose in reference to the manner in which the minutes should be drawn up, so as to vest in the purchaser that moiety of the estate which was vested in the trustee at the time of his death, having regard to the 5th section of the Vendor and Purchaser Act, 1874, and the present section.

Dr. A. Thomson, for the plaintiff, asked for the direction of the court whether the legal estate of the surviving trustee would vest in his heir at law or in his legal personal representative.

The Vice-Chancellor is reported to have said:—"The legal estate must be got in *quite irrespective* of the acts 37 & 38 Vict. c. 78 (Real Property Vendor and Purchaser Act, 1874), s. 5, and the 38 & 39 Vict. c. 87 (The Land Transfer Act, 1875), s. 48. I am of opinion that the legal estate will, after the 1st of January, 1876, be vested in the heir at law of the surviving trustee. The 5th section of the Vendor and Purchaser Act, 1874, will be repealed on and after the 1st January, 1876, except as to anything duly done thereunder before that date; and, assuming that nothing will have been done under section 5, the legal estate will be in the heir at law. All I can now do is to direct that all necessary parties do execute a proper conveyance" (c).

It has been well stated (d), that the effect of the decision in

(c) *Weekly Notes*, Dec. 25th, 1875 (Dec. 20th); L. R., 1 Ch. Div., 279. The Vice-Chancellor gave a useful definition of a "bare trustee," which will be found *supra*, under section 5 of the Vendor and Purchaser Act, 1874.

(d) *Solicitors' Journal*, Vol. xx., p. 209.

Christie v. Ovington is, that "the object of *both* acts being to get rid of heirs," and "the trustee having fulfilled the requirements of *both* acts by dying intestate," the Vice-Chancellor has "re-introduced the heir" in the teeth of both acts. The blame of this decision has been laid upon the writer, as it is said that he misled the Vice-Chancellor by introducing the saving clause, "except as to anything duly done thereunder before the commencement of this act." But to any one who carefully considers the Vice-Chancellor's language, it will be abundantly clear that the saving clause had nothing to do with his decision. His lordship, after citing the saving clause, said:—"Assuming that nothing will have been done under section 5, the legal estate will be in the heir-at-law after the 1st January, 1876." If "nothing has been done under section 5," the saving clause does not apply. Its application is confined to the case of *something having been done* under section 5, *e. g.* to the case already put of a conveyance taken from the legal personal representative instead of from the devisee, between the 7th August, 1874, and the 1st January, 1876.

Whatever doubt there might have been as to whether section 5 of the Vendor and Purchaser Act, 1874, took the estate out of the devisee, there could have been none that it took the estate out of the heir. If, between the 7th August, 1874, and 1st January, 1876, a conveyance was taken from the heir, on the faith of the construction that the 5th section left the estate in the heir, the saving clause would not have helped the conveyance, because that clause only protects the conveyance in case of the death of the bare trustee testate.

PART III.

UNREGISTERED DEALINGS WITH REGISTERED LAND.

SECTION 49.

Effect of Unregistered Dispositions.

The registered proprietor alone shall be entitled to transfer or charge registered land by a regis-

tered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this act in that behalf mentioned.

The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land.

This is one of the most valuable provisions of the act, sanctioning, as it does, the utmost elasticity in dealing off the register with registered land. As to cautions, see sect. 53, *infra*.

The section of the Land Registry Act, 1862, which deals with the subject-matter of this section, is the 74th, the first clause of which is incorporated with this section:—"Every person having a sufficient estate or interest in registered land, may, by will, deed, or other instrument, create the same estates and interests in, and enter into the same contracts and engagements with respect to such land, as he might do if the land were not registered."

It will be observed that the words "by will, deed, or other instrument," are omitted, so as to widen the effect of the clause; but the words "subject to the maintenance of the estate and right

of such proprietor," are added, and protect the registered proprietor against unregistered dealings (e).

Notice of Leases.

SECTION 50.

Lessee may apply for Registration of Notice of Lease.

Any lessee or other person entitled to or interested in a lease or agreement for a lease of registered land made subsequently to the last transfer of the land on the register, where the term granted is for a life or lives, or is determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with such lease or agreement, may apply to the registrar to register notice of such lease or agreement in the prescribed manner, and when so registered every registered proprietor of the land, and every person deriving title through him, excepting proprietors of incumbrances registered prior to the registration of such notice, shall be deemed to be affected with notice of such lease or agreement as being an incumbrance on the land in respect of which the notice is entered.

This section is founded on the recommendations of the Land Transfer Commissioners, 1869 (f):—"Lessees should have power of giving specific notice of their leases, stating to what

(e) In the opinion of the Assistant Registrar, kindly communicated to the writer, "in all dealings for value on the register in the statutory form (i. e. 'statutory dealings') the register alone has to be consulted; and a *purchaser* (on the register) has nothing whatever to do with the unregistered title. If there are cautions, &c., he will, of course, require them to be discharged; *but this will be for the vendor to attend to*, and the title of the cautioners need not be inquired into by the purchaser." (MS. *penes me.*)

(f) Para. 84, p. XXX.

part of the registered property they apply. Whether these and other notices should be entered on the register, or in a separate book connected with it, is a matter we do not discuss, as it is rather a question of convenience in book-keeping than one of principle. Such notices by a lessee would prevent any sale except of the reversion." Of course, persons who hold under "leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate in cases *where there is an occupation* under such tenancies," need not give notice, as they will be protected by sect. 18 (7), *supra*, "unless the contrary is expressed on the register."

On the subject of "occupation leases," the Land Transfer Commissioners of 1869 say (g):—"We ought to premise that, with respect to ordinary occupation leases, the purchaser ought not to be exonerated from making the ordinary inquiries of those in possession. It is a rule of the Courts of Equity that possession of land constitutes notice of the rights of the possessor. The rule is sometimes pressed a little hardly, but it is founded on a principle of common sense; viz., that any reasonable purchaser will see for himself whether the possession be in accordance with the apparent title, and will make some inquiry if he find that it is not. By excepting occupation leases from the operation of a conveyance through the register, a purchaser will still be left to discharge this simple duty. Such lessees, therefore, need not trouble themselves about the register. This is the plan uniformly recommended, and actually adopted by the Act of 1862."

"The court." See the 114th section and the 63rd Rule (h).

SECTION 51.

Manner of registering Notices of Leases.

In order to register notice of a lease or agreement for a lease, if the registered proprietor of the land does not concur in such registry, the applicant

(g) Para. 82, p. XXX.

(h) "An order of the court is necessary, because the lease to be registered will frequently not accord with the registered proprietorship."—Holt on Registration of Title, 87.

shall obtain an order of the court, authorizing the registration of notice of such lease or agreement and shall deliver such order to the registrar, accompanied with the original lease or agreement, or a copy thereof, and thereupon the registrar shall make a note in the register identifying the lease or agreement or copy so deposited, and the lease or agreement or copy so deposited shall be deemed to be the instrument of which notice is given; but if the registered proprietor concurs in such registry, notice may be entered in such manner as may be agreed upon.

By the 28th General Rule, "every application to register notice of a lease or agreement under the present and the 50th sections shall contain a concise statement of the terms of the lease or agreement for a lease to be noticed. If the registered proprietor of the land does not concur, and a copy only of the original lease or agreement is deposited with the registrar with the order of the court authorizing the registration of the notice, the lease or agreement shall be produced for comparison with the copy. If the registered proprietor concurs, he shall be a party to and sign the application, and his signature shall be attested by a solicitor and duly verified, and the application shall state the terms of the notice proposed to be entered, but such terms shall be subject to the approval of the registrar.

"The lease or agreement shall be left with the application, and shall be stamped to show that a notice of it has been entered upon the register."

See Form 30.

Notice of Estates in Dower or by the Curtesy.

SECTION 52.

Registration of Notices of Estates in Dower or by the Curtesy.

Any person entitled to an estate in dower or by the curtesy in any registered land may apply in

the prescribed manner to the registrar to register notice of such estate; and the registrar, if satisfied of the title of such person to such estate, shall register notice of the same accordingly, in the prescribed form, and, when so registered, such estate shall be an incumbrance appearing on the register, and shall be dealt with accordingly.

The present section supplies a curious omission in the Land Registry Act, 1862, which contains no provision as to estates in dower and by the curtesy (*i*).

The fee for any entry under this section is the same "as for a charge of the same value as the estate to be entered, to be ascertained as the registrar may direct" (*k*). See as to the mode of applying, General Rule 26, and Form 28. See also sect. 44, as to the registration of such person, as the registrar may appoint, as joint proprietor with the husband, tenant by the curtesy. The tenant in dower or by the curtesy is "not entitled to a caution" in respect of such tenancy. Sect. 53.

Cautions against registered Dealings.

SECTION 53.

Caution against registered Dealings how to be lodged.

Any person interested under any unregistered instrument, or interested as a judgment creditor, or otherwise howsoever, in any land or charge registered in the name of any other person, may lodge a caution with the registrar to the effect

(*i*) "There is one estate or interest in the land for which no provision is made by the act—the claim to dower. It is presumed that the registrar, unless he be satisfied that no such claim exist, will introduce it as an exception and qualification on the record of title."—*Urlin & Key*, p. 34.

(*k*) Schedule of Fees, Order of Dec. 30th, 1875.

that no dealing with such land or charge be had on the part of the registered proprietor until notice has been served upon the cautioner.

The caution shall be supported by an affidavit or declaration made by the cautioner or his agent in the prescribed form, and containing the prescribed particulars.

Provided, that a person interested under a lease or agreement for a lease of which notice has been entered on the register, or entitled to an estate in dower, or estate by the curtesy, of which notice has been entered on the register, shall not be entitled to a caution in respect of such lease or estate in dower or by the curtesy.

This and the three following sections relate to cautions *after* registration. As to cautions *before* registration, see sects. 60, 61, 62 and 63, *infra*. The first clause of this section is copied from the 96th section of the Land Registry Act, 1862, "caution" being substituted for "caveat;" the second clause of this section is copied from sect. 97 of the same act.

As to the third clause of this section, see sect. 52, *supra*, relating to dower and curtesy.

The system of "cautions," or "caveats" is founded on the recommendations of the Royal Commission of 1857 (*l*). The idea is derived from the system of putting a *distringas* on the transfer of stock, and the cautioner acquires no right to the land by lodging it, his title depending on the beneficial rights in the land of the person creating the interest in respect of which the caution is lodged (*m*).

By the 16th General Rule, "every caution lodged under the" present "section shall be *signed* by the cautioner or his solicitor, and shall contain a *place of address* in the United Kingdom at which any notice may be served, and the *declaration* in support of the caution shall contain a reference to the land or charge to which the caution applies, and to the registered number of the

(*l*) Report, para. LXVII., p. 37.

(*m*) Holt on Registration of Title, 90.

estate, and shall also contain the particulars of the cautioner's interest in such land or charge."

The form of the caution is given, Form 14; of the declaration in support of it, Form 15. The office fee for every caution, "whether before or after registration," is 1*l.* (*n*).

SECTION 54.

Cautioner entitled to Notice of proposed registered Dealings.

After any such caution has been lodged in respect of any land or charge, the registrar shall not, without the consent of the cautioner, register any dealing with such land or charge until he has served notice on the cautioner, warning him that his caution will cease to have any effect after the expiration of the prescribed number of days next ensuing the date at which such notice is served; and after the expiration of such time as aforesaid the caution shall cease, unless an order to the contrary is made by the registrar, and, upon the caution so ceasing, the land or charge shall be dealt with in the same manner as if no caution had been lodged.

This section is copied from sect. 98 of the Land Registry Act, 1862, the words "without the consent of the cautioner" being, however, added before the word "register," thereby enabling the cautioner to dispense with notice if he pleases. "The prescribed number" is substituted for "twenty-one days." Neither the Commission of 1857 nor that of 1869 seem to have thought of recommending that after the lapse of a certain interval without anything being done by the cautioner, the caution should cease to have any effect, "unless an order to the

(*n*) Schedule of Fees, Order of 30th December, 1875.

contrary is made by the registrar." In the Land Registry Act, 1862, the power here vested in the registrar is vested in the Court of Chancery.

Although it would appear that a caution will *ipso facto* cease under this section, a fee of 7s. will be found charged in the Schedule of Fees for "the removal" of any caution (o).

By the 16th General Rule, "the period to be limited by the notice to be served on the cautioner under the" present "section shall be fourteen days, or such other period, not less than seven days, as the registrar may direct. The consent of a cautioner under the" present "section shall be signed by him, and shall be attested by a solicitor and duly verified."

See Form 16, for a form of notice to the cautioner, and Form 37, for the form of attestation by a solicitor.

SECTION 55.

Registered Dealings delayed on Bond being given.

If before the expiration of the said period the cautioner, or some other person on his behalf, appears before the registrar, and gives sufficient security to indemnify every party against any damage that may be sustained by reason of any dealing with the land or charge being delayed, the registrar may thereupon, if he thinks fit so to do, delay registering any dealing with the land or charge for such further period as he thinks just (p).

This section is copied from sect. 99 of the Land Registry Act, 1862. It contains a useful shortening of procedure, however, enabling the registrar, "if he thinks fit," to delay registering any dealing, instead of having to wait for an order of the Court

(o) Schedule of Fees, Order of 30th December, 1875.

(p) The course of proceeding after the registrar has determined to delay the registration is not defined by the act. See Holt on Registration of Title, 90.

of Chancery, requiring him so to delay. An amendment was introduced in committee on the bill in the House of Commons, enabling the registrar to accept any security he pleases from the cautioner, instead of being obliged to exact from him a bond (*q*), but the marginal note remains unaltered.

SECTION 56.

Compensation for improper lodging of Caution.

If any person lodges a caution with the registrar without reasonable cause, he shall be liable to make to any person, who may have sustained damage by the lodging of such caution, such compensation as may be just, and such compensation shall be recoverable as a debt by the person who has sustained damage from the person who lodged the caution.

Any person aggrieved by any act done by the registrar in relation to cautions under this act, may appeal to the court in the prescribed manner.

This section is copied from the 100th section of the Land Registry Act, 1862, the important qualification, however, of "without reasonable cause," being added, and an action of debt being substituted for an application to the Court of Chancery for compensation.

It will be seen that throughout sections 53—54 the power of deciding questions relating to cautions is (for the first time) vested in the registrar.

The right of appeal in this case is new.

See, as to this right, General Rule 59.

(*q*) The bond was dispensed with by the Land Registry Act, 1862, sect. 114, in the case of any public officer, body, or person representing the public service, the Crown, or the Duchy of Cornwall.

*Inhibition against Registered Dealings without
Order of Court.*

SECTION 57.

*Power of Court or Registrar to inhibit
Registered Dealings.*

The court(*q*), or, subject to an appeal to the court, the registrar, upon the application of any person interested, made in the prescribed manner, in relation to any registered land or charge, may, after directing such inquiries (if any) to be made and notices to be given and hearing such persons as the court or registrar thinks expedient, issue an order or make an entry inhibiting for a time, or until the occurrence of an event to be named in such order or entry, or generally until further order or entry, any dealing with any registered land or registered charge.

The court or registrar may make or refuse to make any such order or entry, and annex thereto any terms or conditions the court or registrar may think fit, and discharge such order or cancel such entry when granted, with or without costs, and generally act in the premises in such manner as the justice of the case requires.

Any person aggrieved by any act done by the registrar in pursuance of this section may appeal to the court in the prescribed manner.

The first clause of this section is founded upon sect. 101 of the Land Registry Act, but with considerable modifications.

The inhibition, which resembles an injunction, could only be issued formerly by the Court of Chancery. By this section the inhibition may be issued (subject to appeal) by the registrar.

(*q*) See sect. 114, and General Rule 63.

The inhibition may be simply by "an entry," as well as by an "order." An opportunity may now also be very properly given for "hearing such persons as the court or the registrar thinks expedient," before issuing the order or making the entry.

"Any dealing." It has been suggested that this only includes dealings *on the* register, not dealings off it (*r*).

The second clause of the present section is copied from sect. 102 of the Land Registry Act, 1862, "or registrar" being inserted in two places after "the court."

The power of appeal given by the 3rd clause from the decision of the registrar is, of course, new. See as to this power, General Rule 59.

"In the prescribed manner." By the 17th General Rule, "every application to the registrar for an inhibiting order under the" present "section shall be supported by the declaration of the applicant or his solicitor, stating the grounds of the application and referring to the evidence in favour thereof. An appointment shall be then made for hearing the same and for production of the evidence in support thereof." See the form of application, Form 17.

The office fee for every order or entry under this section is 1*l.*(*s*).

Power of Registered Proprietor to impose Restrictions.

SECTION 58.

Power to place Restrictions on Register.

Where the registered proprietor of any land is desirous for his own sake, or at the request of some person beneficially interested in such land, to place restrictions on transferring or charging such land, such proprietor may apply to the registrar to make an entry in the register that no transfer shall be made of or charge created on such land, unless the following things, or such of them as the

(*r*) Holt on Registration of Title, 93.

(*s*) Schedule of Fees, Order of 30th Dec., 1875.

proprietor may determine, are done; (that is to say,)

Unless notice of any application for a transfer or for the creation of a charge is transmitted by post to such address as he may specify to the registrar:

Unless the consent of some person or persons, to be named by such proprietor, is given to the transfer or the creation of a charge:

Unless some such other matter or thing is done as may be required by the applicant and approved by the registrar.

This section is copied, almost *verbatim*, from sect. 93 of the Land Registry Act, 1862, the only alteration being the substitution of "apply to make an entry in the register," for "upon application to the registrar direct;" see the proviso, s. 59, "except upon such terms as to payment of fees and otherwise as may be prescribed, or to enter any restriction that the registrar may deem unreasonable or calculated to cause inconvenience."

By the 18th General Rule "every application under the" present "section shall state the particulars of the direction or restriction required to be entered on the register, and shall be proceeded with as the registrar shall direct." See the form of application, Form 18.

The restriction, which will be in the nature of a stop order or distringas, except that *it is imposed on the application of the registered owner himself*, may be employed by an owner who is fearful of his estate being conveyed away from him behind his back by means of forgery or personation; or of a fraudulent disposition by an heir-at-law; or a surviving trustee; or an improper or unwise exercise of a power of sale vested in trustees.

A restriction can be less easily removed, and will, therefore, afford greater security than a caution (*s*).

The office fee for the entry of a restriction under this section is 1*l.* (*t*).

(*s*) Umlin & Key, pp. 109, 110.

(*t*) Schedule of Fees, Order of 30th Dec., 1875.

SECTION 59.

Registrar to enter Restrictions in Register.

The registrar shall thereupon, if satisfied of the right of the applicant to give such directions, make a note of such directions on the register, and no transfer shall be made or charge created except in conformity with such directions; but it shall not be the duty of the registrar to enter any of the above directions, except upon such terms as to payment of fees and otherwise as may be prescribed, or to enter any restriction that the registrar may deem unreasonable, or calculated to cause inconvenience; and any such directions may at any time be withdrawn or modified at the instance of all the persons for the time being appearing by the registry to be interested in such directions, and shall also be subject to be set aside by the order of the court.

This section is (mainly) a copy of sect. 94 of the Land Registry Act, 1862, the words "if satisfied of the right of the applicant to give such directions," and also the words "but it shall not be the duty of the registrar to enter any of the above directions," &c., down to "inconvenience," being added.

By the 18th General Rule, "every application under the" present "section to withdraw or modify any direction or restriction shall be made and signed by all persons for the time being appearing by the register to be interested in such direction or restriction, and shall be attested by a solicitor and duly verified." See the form of application to withdraw or modify a restriction, Form 19.

The office fee for a withdrawal or modification of restrictions is 7s.(u).

(u) Schedule of Fees, Order of 30th Dec., 1875.

PART IV.

PROVISIONS SUPPLEMENTAL TO FOREGOING
PARTS OF ACT.

Caution against Entry of Land on Register.

SECTION 60.

Caution against Registration of Land.

Any person having or claiming such an interest in any land which is not already registered as entitles him to object to any disposition thereof being made without his consent, may lodge a caution with the registrar to the effect that the cautioner is entitled to notice in the prescribed form, and to be served in the prescribed manner, of any application that may be made for the registration of such land.

This and the three following sections relate to cautions *before* registration. As to cautions *after* registration, see sects. 53, 54, 55 and 56, *supra*.

This section is copied from sect. 35 of the Land Registry Act, 1872, the words "in the prescribed form, and to be served in the prescribed manner" being inserted after the word "notice."

By the 15th General Rule it is provided, that "every caution lodged under the" present "section shall be signed by the cautioner or his solicitor, and shall contain a place of address in the United Kingdom at which any notice may be served; and the description of the land to be contained in the declaration in support of the caution shall refer to an extract from the public map, with a revision and enlargement of such extract where necessary, delineating the land and defining its locality, and such declaration shall be left with the caution. Every caution shall be renewed before the expiration of five years from the date of lodg-

ing the same, otherwise it shall be treated as withdrawn." See the form of caution, Form 11.

Search should always be made for this class of cautions before formally applying for first registration (v).

SECTION 61.

Caution to be supported by Affidavit.

The caution shall be supported by an affidavit or declaration in the prescribed form, stating the nature of the interest of the cautioner, the land to be affected by such caution, and such other matters as may be prescribed.

This section is copied from sect. 36 of the Land Registry Act, 1862. The words "the land to be affected by such caution" were added in committee on the bill in the House of Commons.

See the form of declaration, Form 12.

SECTION 62.

Cautioner entitled to Notice of Proposed Registration of Land.

After a caution has been lodged in respect of any land which has not already been registered, registration shall not be made of such land until notice has been served on the cautioner to appear and oppose, if he thinks fit, such registration, and the prescribed time has elapsed since the date of the service of such notice, or the cautioner has entered an appearance, which may first happen.

This section is copied from sect. 38 of the Land Registry Act, 1862. The words "in respect of any land which has not already been registered" being added *ex abundanti cautela*, and "the prescribed time has elapsed" being substituted for "ten days has expired."

By the 15th General Rule, "the period to be limited by the notice to be served on the cautioner under the 62nd section shall be fourteen days, or such other period (not less than seven days) as the registrar may direct." The notice is to be served personally or by post. See the form of notice, Form 13.

SECTION 63.

Compensation for Improper Lodging of Caution.

If any person lodges a caution with the registrar without reasonable cause, he shall be liable to make to any person who may have sustained damage by the lodging of such caution such compensation as may be just, and such compensation shall be deemed to be a debt due to the person who has sustained damage from the person who has lodged the caution.

This section is copied from sect. 39 of the Land Registry Act, 1862, the words "wrongfully and" being omitted, before "without reasonable cause," and an action of debt being substituted, as in sect. 56, *supra*, for an application to the Court of Chancery for compensation.

SECTION 64.

Saving as to Effect of Caution.

A caution lodged in pursuance of this act shall not prejudice the claim or title of any person, and shall have no effect whatever except as in this act mentioned.

This section is copied from sect. 40 of the Land Registry Act, 1862, "except as in this act mentioned" being substituted for "except to entitle the cautioner to receive such notice, as is hereinbefore mentioned, of any application made for registration of land."

Crown Lands.

SECTION 65.

Facilities for Registration of Crown Lands.

With respect to land or any estate, right, or interest in land vested in her Majesty, her heirs or successors, either in right of the Crown or of the Duchy of Lancaster, or otherwise, or vested in any public officer or body in trust for the public service, the public officer or body having the management thereof (if any), or, if none, then such person as her Majesty, her heirs, or successors, may by writing under her or their Sign Manual appoint, may represent the owner of such land, estate, right or interest for all the purposes of this act, and shall be entitled to such notices and may make and enter any such application or cautions, and do all such other acts, as any owner of land, or of any estate, right, or interest therein (as the case may be) is entitled to receive, make, enter, or do under this act; and with respect to land or any estate, right or interest in land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall for the time being, or as the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, may in writing appoint, may act as and represent the owner of such land, estate, right, or interest for all the purposes of this act, and shall be entitled to receive such notices, and may make and enter any such application or cautions, and do all such other acts as any owner of land or of any estate, right, or interest in land (as the case may be) is entitled to make, enter, or do under this act.

This section is copied almost *verbatim* from the 114th section

of the Land Transfer Act, 1862, "may" being substituted throughout for "shall" or "may and shall," and "any owner of land, or of any estate, right, or interest therein," being substituted for "any owner of the lands for an estate in fee simple," the object being to render the clause more elastic.

SECTION 66.

Registry of Land below High Water Mark.

If it appears to the registrar that any land, application for registration whereof is made to him, comprises land below high water mark at ordinary spring tides, he shall not register the land unless and until he is satisfied that at least one month's notice in writing of the application has been given to the Board of Trade; and in case of land in the county palatine of Lancaster, also to the proper officer of the Duchy of Lancaster; and in case of land in the counties of Cornwall or Devon, also to the proper officer of the Duke of Cornwall; and in all other cases also, to the Commissioners of her Majesty's Woods, Forests, and Land Revenues.

This section was not originally in the bill; it was added by the Attorney-General in Committee. Lands below high water mark at ordinary spring tides *prima facie* belong to the Crown.

By the 2nd General Rule, "where land comprised in an application for registration is below high water mark at ordinary spring tides, the fact shall be stated in the application, and the notices required by the" present "section shall be prepared by the applicant and served through the office within seven days of the application being left."

As to Proceedings on and before Registration.

SECTION 67.

Registration of Lands of different Tenures.

If it appears to the registrar that any land, application for registration whereof is made to him, comprises land of freehold tenure and also land of a tenure other than freehold intermixed and undistinguishable, he may, notwithstanding anything in this act, register the land, but he shall enter notice on the register in such manner as he thinks fit of the facts relating to the tenure of the land, and the tenure of the portion of the land other than freehold shall remain unaffected by the registration.

The act only applies to land as defined by sections 2, 4 and 11. The definitions exclude copyholds and leaseholds for a less term than twenty-one years. The meaning of the present section is, that copyholds or leaseholds for a less term than twenty-one years may be registered, if intermixed with freehold land so as to be undistinguishable; but the registration will not affect such copyholds or leaseholds in any way.

SECTION 68.

Trustees may sell by medium of Registry.

Any person holding land on trust for sale, and any trustee, mortgagee, or other person having a power of selling land, may authorize the purchaser to make an application to be registered as first proprietor with any title which a proprietor is authorized to be registered with under this act, and may consent to the performance of the contract being conditional on his being so registered, or may himself apply to be registered as such

proprietor with the consent of the persons (if any) whose consent is required to the exercise by the applicant of his trust or power of sale; and the amount of all costs, charges, and expenses properly incurred by such person in or about such application shall in all cases be ascertained and declared by the registrar, and shall be deemed to be costs, charges, and expenses properly incurred by such person in the execution of his trust or in pursuance of his power; and such person may retain or reimburse the same to himself out of any money coming to him under the trust or power, and he shall not be liable to any account in equity in respect thereof.

This section, which is far reaching in its scope, must be considered as engrafted on sections 5 and 11, *supra*, as to the persons competent to apply to be registered. A trustee or mortgagee cannot apply to have a nominee registered under this section.

“Costs, charges and expenses.” These are, *primâ facie*, under sect. 73, payable by the applicant. Hence the necessity for this enactment for the relief of trustees, &c.

By the first General Rule, “where the application for registration is made by virtue of a trust or power of sale, the *consent in writing* of the person, if any, whose consent is required to the exercise of such trust or power, shall be also left with the application.” See the form of consent, Form 1. Where the application is by the purchaser, a similar consent in writing of the vendor or his solicitor must be left with the application (General Rule 1 and Form 1).

SECTION 69.

Registration of Part Owners.

Any two or more persons entitled for their own benefit, concurrently or successively, or partly in one mode and partly in another, to such estates, rights, or interests in land as together make up

such an estate as would, if vested in one person, entitle him to be registered as proprietor of the land, may (subject as in this act mentioned with respect to the number of persons to be registered in respect of the same land (x)) apply to the registrar to be registered as joint proprietors, in the same manner, and with the same incidents, so far as circumstances admit, in and with which it is in this act declared that any individual proprietor may be registered.

This section must also be considered as engrafted on sects. 5 and 11, *supra*, as to the persons who can apply to be registered. See sect. 83 (2), (3), *infra*.

SECTION 70.

Instruments and Facts affecting the Title to be disclosed on Registrations.

Before the completion of the registration of any land in respect of which an examination of title is required, the vendor and his solicitor, in cases where the applicant is a person who has contracted to buy such land, and in all other cases the applicant for registration and his solicitor, shall each, if required by the registrar, make an affidavit or declaration that to the best of his knowledge and belief all deeds, wills, and instruments of title, and all charges and incumbrances affecting the title to the land which is the subject of the application, and all facts material to such title, have been disclosed in the course of the investigation of title made by the registrar. The registrar may require any person making an affidavit or declaration in pursuance of this section to state in his affidavit

(x) See General Rule 37.

or declaration what means he has had of becoming acquainted with the several matters referred to in this section ; and if the registrar is of opinion that any further or other evidence is necessary or desirable, he may refuse to complete the registration until such further or other evidence is produced.

See General Rule 47, by which it is provided that the declaration "may be made in the office (sect. 109) or before any person authorized by law to take statutory declarations." It must be filed in the office.

By General Rule 55, "If *at any time* the registrar is of opinion that any further or other evidence is necessary or desirable, he may refuse to complete any dealing with the register until such further or other evidence has been produced."

The first clause of this section is copied, with certain slight modifications, from sect. 22 of the Land Registry Act, 1862. The section is extended to "the vendor and his solicitor, in cases where the applicant is a person who has contracted to buy the land," as well as to "the applicant for registration and his solicitor." The old act requires the parties to "make oath;" the present section gives the alternative of a "declaration."

The last sentence of this section, "if the registrar is of opinion," &c., is copied *verbatim* from sect. 23 of the Land Registry Act, 1862.

In Ireland it is not the practice to require an affidavit or declaration, such as that required by this section (y).

The form of the declaration will be found in Form 10(z).

SECTION 71.

Production of Deeds.

When an application has been made to the registrar for the registration of any land (a), if any

(y) Umlin & Key, p. 38.

(z) "In most cases the declaration will be required." Holt on Registration of Title, 159.

(a) In Mr. Holt's opinion, the powers given by this section

person has in his possession or custody any deeds, instruments, or evidences of title relating to or affecting such land, to the production of which the applicant, or any trustee for him, is entitled, the registrar may require such person to show cause, within a time limited, why he should not produce such deeds, instruments, or evidences of title to the registrar, or otherwise, as the registrar may deem fit; and, unless cause is shown to the satisfaction of the registrar within the time limited, such deeds, instruments, and evidences of title may be ordered by the registrar to be produced at the expense of the applicant, at such time and place, and in such manner, and on such terms as the registrar thinks fit.

Any person aggrieved by any order of the registrar under this section may appeal in the prescribed manner to the court, which may annul or confirm the order of the registrar with or without modification.

If any person disobeys any order of the registrar made in pursuance of this section, the registrar may certify such disobedience to the court, and thereupon such person, subject to such right of appeal as aforesaid, may be punished by the court in the same manner in all respects as if the order made by the registrar were the order of the court.

This is one of the most salutary amendments of the old law contained in the present act. There was no power given by the old act, either to the court or to the registrar, to compel the production to the registrar of any title deeds in the hands of third parties (*b*). The applicant for registration under that act was in

may be exercised *after* registration as well as *before* it.—Registration of Title, 105, 106.

(*b*) See, however, as to judicial sales, sect. 53 of the Act of 1862.

a worse position than if the deeds were lost, for in that case he might have supplied the deficiency by proving the loss, and furnishing secondary evidence of their contents. The Irish court has, on the other hand, power to compel production of title deeds to the examiner of the court, and has constantly exercised this power (c).

It is important, however, to note the qualification contained in the words of this section, "to the production of which the applicant or any trustee for him is entitled" (d). The registrar will be obliged to decide whether the applicant or his trustee is so entitled, before requiring the person in whose custody the documents are to produce them.

Subject to this remark, the present section is very satisfactorily framed. On the one hand, it protects the third party against any expense, which is thrown entirely upon the applicant, and, also, against an unreasonable demand, by giving him a right of appeal to the court; while, on the other hand, the registrar is empowered to apply for the imprisonment of the third party for contempt of court, if he disobeys the registrar's order to produce.

By the 4th General Rule, "where any person shall be required to produce deeds, instruments, or evidence of title under the" present "section, the requirement to produce the same shall be *prepared by the applicant and settled by the registrar and served through the office.*"

The 109th section of this act contains an equally salutary and more drastic process for the inspection of "maps, surveys and books kept in pursuance of any act of Parliament. The registrar may, by summons under the seal of the office of Land Registry, require any person having the custody of any such map, survey or book to produce it for his inspection. The person on whom the summons is served is not allowed, like the person who has in his possession or custody deeds, instruments or evidences of

(c) Umlin & Key, pp. xlv. 38 and 39.

(d) This has been explained to mean "either that the applicant or his trustee has a legal covenant to produce, or, at least, an equitable right to production."—Holt on Registration of Title, 102. See as to the production of title deeds, rules 3, 4 and 5 of the 2nd section of the Vendor and Purchaser Act, 1874, *supra*.

title, to show cause why he should not produce the maps, surveys or books in question. The summons is peremptory and without appeal, and by section 110, the person summoned is liable, on summary conviction, for wilful neglect or refusal to produce, to a penalty of 20*l*.

As to the appeal under this section, see General Rule 59.

SECTION 72.

Deeds to be marked with Notice of Registration.

A person shall not be registered as proprietor of land until, if required by the registrar, he has produced to him such documents of title as will in the opinion of the registrar, when stamped or otherwise marked, give notice to any purchaser or other person dealing with such land of the fact of the registration, and the registrar shall stamp or otherwise mark the same accordingly, or until he has otherwise satisfied the registrar that the fact of such registration cannot be concealed from a purchaser or other person dealing with the land.

This section is copied from sect. 91 of the Land Registry Act, 1862. It forms an important protection to persons dealing with the land, as the deeds will show *on the face of them* that the title to which they relate is registered (*e*).

SECTION 73.

Costs of Application for Registry.

All costs, charges and expenses that are incurred by any parties in or about any proceedings

(*e*) In any case where the deeds are in the possession of an incumbrancer, his consent to their production for the purposes of sect. 72 should be obtained in the first instance. (Holt on Registration of Title, 42.)

for registration of land (*f*) shall, unless the parties otherwise agree, be taxed by the taxing officer of the Court of Chancery as between solicitor and client, but the persons by whom and the proportions in which such costs, charges and expenses are to be paid shall be in the discretion of the registrar, and shall be determined according to orders of the registrar, regard being had to the following provision; namely, that any applicant under this act is liable *prima facie* to pay all costs, charges and expenses incurred by or in consequence of his application, except in a case where parties object whose rights are sufficiently secured without their appearance, or where any costs, charges or expenses are incurred unnecessarily or improperly, and subject to this proviso, that any party aggrieved by any order of the registrar under this section may appeal in the prescribed manner to the court, which may annul or confirm the order of the registrar, with or without modification.

If any person disobeys any order of the registrar made in pursuance of this section, the registrar may certify such disobedience to the court, and thereupon such person, subject to such right of appeal as aforesaid, may be punished by the court in the same manner in all respects as if the order made by the registrar were the order of the court.

This section supplies a curious omission in the Land Registry Act, 1862. That act contained no provision for the taxation of costs "in or about any proceedings for the registration of land" *before the registrar*.

The costs of "proceedings for the registration of land" before

(*f*) In Mr. Holt's opinion the section applies to dealings with land *after* registration. (Registration of Title, 105, 106.)

the Court of Chancery, or the judge, were, however, taxable in ordinary course by the taxing masters in chancery (*g*). This section provides for the taxation of costs in all cases, "unless the parties otherwise agree."

Another curious omission in the Land Registry Act, 1862, is also supplied by this section. If an objector failed in his objection to registration before the registrar, there was no power to make him pay costs. The registrar had power under the 24th section of the old act to order the costs and expenses *properly* incurred by any person *properly* appearing upon any proceeding taken under the act to be paid by the applicant; but it does not appear that the registrar had any power of directing payment of costs by any persons making frivolous and unnecessary objections to registration (*h*).

The words of the present section, "except in a case where parties object whose rights are sufficiently secured without their appearance, or where any costs, charges or expenses are incurred unnecessarily or improperly," taken in connection with what follows, appear to throw a liability to pay costs on the persons unnecessarily appearing or improperly objecting, though such liability is not, in express terms, thrown upon them.

The 12th General Order, of 1st October, 1862, under the Act of 1862, directed that the applicant, or his solicitor, should, when required by the registrar, secure the payment of any costs and expenses by the undertaking in writing of himself or his solicitor, or by deposit of money. Sect. 24 of the old act also required the applicant for registration, in all cases when applying for registration with an indefeasible title, to give security for costs. Upon this enactment Mr. Urlin remarks (*i*): "It does not appear in what way an undertaking given to the registrar is to be enforced, except by refusing to complete the registration." The Landed Estates Court, Ireland, he adds, being a court of equity, enforces compliance with undertakings by attachment. The last clause of the present section gives the registrar power to apply

(*g*) See Urlin & Key, pp. 133, 134. See sect. 61 of the Act of 1862.

(*h*) Urlin & Key, pp. 21, 134.

(*i*) Page 41.

to the court to have his orders for the payment of costs enforced in a similar manner.

As to the appeal under this section, see General Rule 59. See as to the "costs, charges, and expenses" of trustees, sect. 68, *supra*.

Doubtful Questions arising on Title.

SECTION 74.

Registrar may state Case for Court of Law or direct Issue.

Whenever, upon the examination of the title to any land (*k*), the registrar entertains a doubt as to any matter of law or fact arising upon such title, he may, upon the application of any party interested in such land, refer a case for the opinion of any of her Majesty's superior courts, with power for the court to direct an issue to be tried before any jury for the purpose of determining any fact; the registrar may also name the parties to such case, and the manner in which the proceedings in relation thereto are to be brought before the court to which such case is referred.

See the next section.

Under sect. 115, *infra*, the Lord Chancellor has power to assign the duties vested in the Court of Chancery, under the act, to any particular judge.

The sections of the Land Registry Act, 1862, which relate to "referring the solution of doubts as to any matter of law or fact arising upon the title" to a judge, are the 6th, 17th, and 92nd. The 89th and 90th sections of that act also contain provisions for the reference of various matters to a judge. In some of these cases, as, for instance, under the 17th section,

(*k*) In Mr. Holt's opinion this section applies to dealings with land already registered. (Registration of Title, 105, 106.)

the parties are furnished with the same power to refer the matter in dispute to a judge as the registrar. Under the present section it is optional with the registrar whether he will permit the reference to be made or not. "The registrar may," not shall, "refer." The registrar has, under the 36th General Rule, power himself to resolve any doubts or questions arising on registration:—"If at any time during the investigation of title, or in any registration proceeding, any question, or doubt or dispute arise, notice may, with the consent of the registrar, be given by the applicant to any person interested in such question or doubt or dispute, to the effect that the same will be brought before the registrar at a time to be mentioned in such notice, and that such person may attend before the registrar at such time by himself or his counsel or solicitor, and take part in the investigation and settlement of such question, doubt, or dispute." The applicant for registration does not appear to have any power to appeal against the decision of the registrar to the judge, but an objector to registration has, under sect. 17, such power. Under the old act the applicant had no power to appeal against the refusal of the registrar to register (*l*), but he could appeal against the decision of the registrar in favour of an objection (*m*).

SECTION 75.

Opinion of Court or Decision of Jury, how far conclusive.

The opinion of any court to whom any case is referred by the registrar shall be conclusive on all the parties to such case, unless the court before whom such case is heard permits an appeal to be had.

See the last section and the note thereto, and sect. 117.

(*l*) Umlin & Key, p. 9.

(*m*) Sect. 13.

SECTION 76.

Intervention of Court in case of Incapacitated Persons.

Where any infants, married women, idiots, lunatics, persons of unsound mind, persons absent beyond seas, or persons yet unborn, are interested in the land in respect of the title to which any question arises as aforesaid, any other persons interested in such land may apply to "the court," as defined by this act, for a direction that the opinion of the court to whom the case is referred under this act shall be conclusively binding on such infants, married women, idiots, lunatics, persons of unsound mind, persons beyond the seas, or unborn persons.

See further, as to persons under disability, sects. 77, 87, and 88, *infra*. "The Court" is defined by sect. 114, *infra*, and General Rule 63.

SECTION 77.

Power of Court to bind Interests of Incapacitated Persons.

The court, as defined by this act, shall hear the allegations of all parties appearing before it. It may disapprove altogether, or may approve, either with or without modification, of the directions of the registrar in respect to any case referred as to the title of land; it may also, if necessary, appoint a guardian or other person to appear on behalf of any infants, married women, idiots, lunatics, persons of unsound mind, persons absent beyond seas, or unborn persons; and if such court is satisfied that the interests of the persons labouring under disability, absent, or unborn, will be sufficiently

represented in any case, it shall make an order declaring that all persons, with the exceptions (if any) named in the order, are to be conclusively bound, and thereupon all persons, with such exceptions, if any, as aforesaid, shall be conclusively bound by any decision of the court having cognizance of the case in which such persons are concerned.

See the last section and sect. 88.

As to "the Court," see sect. 114, *infra*, and General Rule 63.

*As to Land Certificates, Office Copies of Leases,
and Certificates of Charge.*

SECTION 78.

*Loss of Land Certificate, or Certificate of Charge,
or Office Copy of Lease.*

If any land certificate or office copy of a registered lease or certificate of charge is lost, mislaid, or destroyed, the registrar may, upon being satisfied of the fact of such loss, mislaying, or destruction, grant a new land certificate or office copy or certificate of charge in the place of the former one.

As to land certificates, see sects. 10 and 29; General Rule 33; and Form 36. As to certificates of charge, see sect. 22; General Rule 32; and Form 36. As to office copies of leases, see sect. 16; General Rule 34; and Form 36.

This section is copied from sect. 118 of the Land Registry Act, 1862, with the addition of the words, "or office copy of a registered lease or certificate of charge," of the word "mislaid" after "lost," and of the word "mislaying" after "loss:" thus extending the operation of the old law to land certificates "mislaid," as well as "lost" or "destroyed," and to office copies of registered leases and certificates of charge lost, mislaid or destroyed.

The experience of the Irish Landed Estates Court has shown

that affidavits of the "loss" of documents are to be acted upon with great caution. Under the present act, as under the Land Registry Act, 1862, an important question might arise between the innocent holder of a land certificate supposed to be lost, and the equally innocent holder of a substituted certificate. If a land certificate be represented as lost, the first presumption will be that the missing certificate is, in fact, in the hands of an equitable mortgagee by deposit (*n*). (See sect. 81, *infra*, and sects. 63 and 73 of the Land Registry Act, 1862.)

By the 35th General Rule, "every application for a new land certificate or office copy of a registered lease, or certificate of charge, to be granted under the" present "section shall be supported by a *declaration of the applicant*, stating the fact that the former one has been lost, mislaid, or destroyed, and the circumstances thereof, and the new certificate or copy shall contain a statement that it is granted in the place of the certificate or copy lost, mislaid, or destroyed."

See the next section.

The fee for every new land certificate or office copy of lease, where the original certificate or office copy is lost, mislaid or destroyed, is the same as for the original, *i. e.* 10s. (*o*).

SECTION 79.

Renewal of Land Certificate, or Certificate of Charge, or Office Copy of Lease.

The registrar may, upon the delivery up to him of a land certificate or of an office copy of a registered lease or of a certificate of charge, grant a new land certificate or office copy of a lease or certificate of charge in the place of the one delivered up.

See the last section.

This section is copied from sect. 119 of the Land Registry Act, 1862, the words, "or of an office copy of a registered

(*n*) Umlin & Key, p. 126.

(*o*) Schedule of Fees, Order of 30th Dec., 1875.

lease, or of a certificate of charge," being added in two places after the words, "land certificate:" thus extending the operation of the old law to office copies of registered leases, or of certificates of charge delivered up to the registrar.

SECTION 80.

Land Certificate, Certificate of Charge, and Office Copy of Lease to be Evidence.

Any land certificate or certificate of charge shall be *primâ facie* evidence of the several matters therein contained, and the office copy of a registered lease shall be evidence of the contents of the registered lease.

This section is copied from sect. 71 of the Land Registry Act, 1862, with the addition of the words, "*primâ facie*," before "evidence," and at the end of the section of the words, "and the office copy of a registered lease shall be evidence of the contents of the registered lease."

The words, "*primâ facie*," have been very properly prefixed to the word "evidence," as the land certificate or certificate of charge will only testify to the state of the title at the date of its issue; and after that date it will not necessarily show the real state of the holder's title as it appears on the register. The transferee of the land or charge should, therefore, compare the certificate with the register. This will also be useful for the purpose of ascertaining whether a substituted certificate has been issued under sect. 78 (*p*).

SECTION 81.

Effect of Deposit of Land Certificate.

Subject to any registered estates, charges, or rights, the deposit of the land certificate in the case of freehold land, and of the office copy of the

registered lease in the case of leasehold land, shall, for the purpose of creating a lien on the land to which such certificate or lease relates, be deemed equivalent to a deposit of the title deeds of the land.

This section is taken from sect. 73 of the Land Registry Act, 1862, the words, "subject to any registered estates, charges, or rights," being added at the commencement of the section; and the words, "in the case of freehold land, and of the office copy of the registered lease of leasehold land," being added after "land certificate." The words, "land to which such lease or certificate relates," are substituted for "estate and interest of the depositor," and "be deemed equivalent to," for "have the same effect as."

The substitution of a single statutable document for a collection of title deeds will, among other advantages, prevent the occurrence of such a case as *Roberts v. Croft* (*q*), where there was a contest between two mortgagees, each holding some of the title deeds (*r*). (But title deeds may still be deposited.)

A difference of opinion existed in the House of Commons on the policy of permitting a lien to be created on the registered land by a deposit of the land certificate. The clause was objected to by Mr. (now Sir Henry) Jackson, Q.C., who believed it was inconsistent with the object and scope of the bill. The Attorney-General, on the other hand, said it would give *additional facilities* in many cases *to the raising of money for temporary purposes*, and he was unable to see any objection to it. Mr. Marten, Q.C., hoped the opposition would not be persisted in (*s*). Mr. Jackson, however, divided, and was defeated by a majority of fourteen, the numbers being, for the clause forty-nine, against it thirty-five.

Any mischief which might have been apprehended if the old law had been simply re-enacted will be lessened, if not avoided, by the introduction of the words which declare that the equitable

(*q*) 27 L. J., Ch. 220.

(*r*) Umlin & Key, p. 87.

(*s*) See the *Times* of Monday, August 9th, 1875, Parliamentary Report.

mortgage, by deposit of the land certificate or office copy lease, shall take effect "subject to any *registered* estates, charges or rights," whether created before or after such equitable mortgage. The equitable mortgagee should lodge a caution with the registrar, under section 53 (Form 16) (*t*).

The fee for "any entry in respect of a deposit of a land certificate" is "the same as for a charge for the amount secured by the deposit" (*u*).

Special Hereditaments.

SECTION 82.

Registry of Advowsons and other Special Hereditaments.

The registrar may register the proprietor of any advowson, rent, tithes impropriate, or other incorporeal hereditament of freehold tenure, enjoyed in gross, also the proprietor of any mines or minerals where the same have been severed from the land, in the same manner and with the same incidents in and with which he is by this act empowered to register land, or as near thereto as circumstances admit.

The registrar may also, in the prescribed manner, register any fee farm grant, or other grant, reserving rents or services to which the fee simple estate in any freehold land about to be registered or registered may be subject, with such particulars of the land or services, and the conditions annexed to the non-payment or non-performance or otherwise of such rent and services as may be prescribed, and any record so made shall be conclusive evi-

(*t*) See, as to this, an elaborate note of Mr. Holt, *Registration of Title*, 50.

(*u*) *Schedule of Fees*, Order of 30th December, 1875.

dence as to the rents, services, and conditions so recorded, and such fee simple estate as last aforesaid shall be subject thereto accordingly.

By the 62nd General Rule it is provided, that "the General Rules and the Forms" annexed to them, "so far as they are capable of being applied or adapted, shall apply to the registration of the proprietorship of incorporeal hereditaments, and also of mines and minerals, where the same have been severed from the land." See further, as to mines and minerals, sect. 18, subsect. (c), *supra*, and the note thereto.

By the 32nd General Rule, the "manner" is thus "prescribed":—"Every application to register a grant under the second paragraph of the 82nd section shall be made with the *consent in writing*, duly verified, of the person registered, or about by himself or nominee to be registered, as proprietor of the land affected thereby. If the application relate to any land about to be registered with an absolute or qualified title, the grant to be registered shall be in accordance with the title examined by the registrar, and if the application relate to any land already registered it shall be supported by a *declaration* of the applicant and his solicitor, which shall state in concise terms the existing rights of the several persons interested in such land, and be left with the application.

"The registrar may in any case require such other evidence, if any, and such notices to be given as he may think fit, and the matter to be proceeded with as he may direct.

"In any case of an application for registration of a grant under the second paragraph of the 82nd section, a printed copy thereof, and also the original grant for examination and stamping, shall be left in the office with the application. The registration of such grant, and of the particulars and conditions thereof, may be made by a reference to such printed copy on the register of the estate affected by such grant.

"The proprietorship of any rent, the grant of which is registered under the second paragraph of the 82nd section, may, if capable of separate registration under the act (x), be separately registered,

(x) *I. e.*, under the first paragraph of this section.

notwithstanding the registration of such grant under the second paragraph of the 82nd section."

The forms of application will be found in the schedule of forms, Forms 34 and 35, Form 34 relating to land about to be registered, Form 35, to registered land.

The present section must be read in connection with sections 5 and 11, and be considered as engrafting upon them additional subject-matters of registration.

The fee for any entry of a grant of a rent under the second paragraph of this section, if the land affected by it be registered with an absolute or qualified title, is the same as for a first entry of land with an absolute or qualified title of the value of the rent at thirty years' purchase. If such land be registered with a possessory title, the fee is the same as for the first registration of land with a possessory title of the value of the rent at thirty years' purchase (*y*).

General Provisions.

SECTION 83.

Enactments as to Registration.

The following enactments shall be made with respect to registration of title:

- (1.) There shall not be entered on the register or be receivable by the registrar, any notice of any trust, implied, express, or constructive; and
- (2.) No person shall be registered as proprietor of any undivided share in any land or charge, and a number of persons exceeding the prescribed number shall not be registered as proprietors of the same land or charge; and if the number of persons showing title exceeds such pre-

(*y*) Schedule of Fees, Order of 30th December, 1875.

scribed number, such of them not exceeding the prescribed number as may be agreed upon, or as the registrar may in case of difference decide, shall be registered as proprietors; and

- (3.) Upon the occasion of the registry of two or more persons as proprietors of the same land or of the same charge, an entry may, with their consent, be made on the register, to the effect that when the number of such proprietors is reduced below a certain specified number, no registered disposition of such land or charge shall be made, except under the order of the court; and
- (4.) Where land is registered in the names of husband and wife as co-proprietors, no registered disposition of such land shall take place until the wife, if alive, has been examined in the prescribed manner and has assented to such disposition after full explanation of her rights in the land and of the effect of the proposed disposition; and
- (5.) Registered land shall be described in such manner as the registrar thinks best calculated to secure accuracy (z), but such

(z) By the 3rd General Rule, "a particular description of the land comprised in the application and, as part thereof, an extract on tracing linen from the public map, with a reference where necessary to a revision and enlargement of such extract, to be made also on tracing linen, delineating the land and defining its locality, shall be left with the application. This description shall be signed by the applicant or his solicitor, and the extract shall have a margin of at least two inches left for annexing to the register; and the public map from which the extract is taken, and the date and scale, if any, marked thereon, shall be stated on the extract."

description shall not be conclusive as to the boundaries or extent of the registered land; and

- (6.) No alteration shall be made in the registered description of land, except under the order of the court or by way of explanation; but this provision shall not be construed to extend to registered dealings with registered land in separate parcels by the registered description although such land was originally registered as one estate; and
- (7.) Previously to registering any proposed purchaser as first proprietor of any land or to registering any disposition of land, it shall be the duty of the registrar to ascertain that all such stamp duties have been satisfied as would be payable if the land had been conveyed by an unregistered disposition to such proposed purchaser, or the disposition to be registered had been an unregistered disposition:
- (8.) The provisions of this act with respect to the liability of registered land to succession duty and to the grant of a certificate by the Commissioners of Inland Revenue in respect of the exemption from succession duty, and to the notification of such exemption on the register, and to the effect of such notification, shall apply with the necessary variations to a registered charge under this act.

(1) There is a marked difference between the old and the new system of registration in respect of *trusts*.

By sect. 38 of the Land Registry Act, 1862, it is provided that, "from and after the registration of any land, every trust" (*inter alia*) "granted, declared, arising, becoming vested, or in

any manner created or coming into existence in, to, upon or out of, or affecting" the "land or any part thereof, shall (except as to the names of persons beneficially entitled to the proceeds of any sale of trust lands: sect. 19) be entered, described and noticed" on the register.

See sect. 7, subsect. (3), *supra*, and note to sect. 30, as to unregistered trusts, created by the first proprietor. Beneficial interests will be protected by subsect. (3) of this section; by cautions, sects. 53, 54, 60, and 62, *supra*; and by the power of the *cestui que trust* to apply to the court to inhibit any dealings with registered land, sect. 57, *supra*. By sect. 58 the *cestui que trust* may apply to the registered owner himself to impose restrictions on dealing with the land.

See on this subsection the Report of the Registration of Title Commission, 1857, para. XLV., L., LXV., LXVII. and LXVIII., and the Report of the Land Transfer Commission, 1869, para. 85—92.

(2) "The prescribed number." The prescribed number is "not exceeding four;" see sects. 5, 11, and 69, *supra*, and General Rule 37.

(3) The fee for every entry under this subsection is 10s. The subsection is founded on the following recommendation of the Registration of Title Commission, 1857:(a)—"Where the parties to a settlement desire it, they will have the power of registering the property in the names of two or more persons as registered owners, with a short note (the words 'no survivorship' will be sufficient) intimating that, in the case of the death of either, the *jus accrescendi* is not to have place. The effect of this will be that if one of the registered owners die, no alteration of the ownership can be made until his place is filled up. And as the prevailing instances of fraudulent or improper alienation of stock are those where it has devolved on one trustee, this simple provision will operate as an almost perfect protection to all parties who have or may have any kind of interest in the registered land under any settlement of which the registered owners are trustees."

(a) Para. LXVI., p. 37, of Report. The arrangement was suggested by Judge Longfield.

By the 19th General Rule, "before any entry is made upon the register, under the 3rd paragraph of the 83rd section, the consent in writing thereto of the persons to be entered as the registered proprietors of the land or charge, stating the particulars of the entry required, shall be lodged in the office."

(4) See, as to this co-proprietorship of freehold land, sect. 44, *supra*. See also sect. 87, *infra*, and General Rule 60, as to the wife's assent.

(5) This is one of the most beneficial provisions of this act (see the notes to the preamble and sect. 1, *supra*). It renders it unnecessary to have any perambulation of boundaries or public survey (*b*). Identity will be proved in the usual way on sales of real property (*c*). The Land Transfer Commissioners say:—

"If there is any border land over which the precise boundary line is obscure, it is usually something of very trifling value, and the purchaser is content to take the property as his vendor had it, and to let all questions of boundary lie dormant. But the Act of 1862 prevents a transfer on these terms. People who are quite content with an undefined boundary are compelled to have it defined. And this leads to two immediate consequences, both mischievous. First, notices have to be served on adjoining owners and occupiers which may and sometimes do amount to an enormous number, and the service of which may involve great trouble and expense. Messrs. Sewell & Co. tell us that in one case they had to serve 135 notices. Mr. Jarrett shows that in one of his cases he had serious difficulty in finding the persons on whom notices had to be served. This is the first mischief. The second is that people served with notices immediately begin to consider whether some injury is not about to be inflicted on them. In all cases of undefined boundary they find that such is the case, and a dispute is thus forced upon neighbours who only desire to remain at peace" (*d*).

See General Rule 3 and Form 2.

(*b*) See Holt on Registration of Title, 10, 28, and 43.

(*c*) *Ib.*, 151, 152.

(*d*) Para. 45, p. xxi. of Report. On the other hand, Col. Leach, the head of the Survey Department of the Tithe Commission, was of opinion that no difficulty arose in ascertaining boundaries under Lord Westbury's Act.

(6) "The order of the court," see sects. 95, 96, *infra*. Sects. 29 and 34, *supra*, contemplate an alienation of "part" only of the registered land. Under the Land Registry Act, 1862, sect. 28, land might, at the option of the proprietor, be registered "as one estate or as separate estates."

By the 48th General Rule, "land separately entered on the register shall be distinguished by a separate number, but so that where the land originally registered is dealt with in separate parcels, each new separate estate shall also refer to the number of the land originally registered, unless the registrar shall otherwise direct."

By the 49th General Rule, "if the registered proprietor of any land is desirous that a revised description and map shall be substituted for the then registered description, the registrar shall, upon an order of the court being obtained under the present section, cause a revised description and map to be substituted accordingly, and in that case such substituted description shall thenceforth be the registered description of the land, but without prejudice to the description existing at the time of such substitution, so far as relates to estates previously registered."

(7) This subsection is (substantially) copied from sect. 88 of the Land Registry Act, 1862. It is incumbent on all officers of courts of justice to see that all deeds produced in evidence are properly stamped. (17 & 18 Vict. c. 125, sects. 28 and 103.) By the 44th General Rule, it is provided that "in all cases the party applying for registration shall satisfy the registrar that all stamp and other duties imposed by any act of parliament have been duly paid and satisfied, but, as to succession duty, subject to the provisions of the act."

(8) As to this subsection, see sect. 18 (b), *supra*, and the 44th General Rule, cited under the last subsection.

SECTION 84.

Annexation of Conditions to Registered Land.

Where any land is about to be registered, or any registered land is about to be transferred to a purchaser for valuable consideration, there may be

registered as annexed thereto, subject to general rules and in the prescribed manner, a condition that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land, and the first proprietor and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition; nevertheless, any such condition may be modified or discharged by order of the court, on proof to the satisfaction of the court that such modification will be beneficial to the persons principally interested in the enforcement of such condition.

This section is copied from sect. 29 of the Land Registry Act, 1862, with some changes in the phraseology.

Such conditions more frequently attach to leasehold than to freehold land. The present section does not, in terms, apply to covenants, but they will, no doubt, when found to exist and to "run with the land," be reserved under this section (d).

"Subject to general rules, and in the prescribed manner." By the 31st General Rule, it is provided as follows:—

"Every application to register conditions as annexed to land about to be registered, or to any registered land about to be transferred, shall be made in case of land about to be registered either by the person who by himself or nominee is about to be registered as proprietor of the land, or with his consent in writing duly verified, and in the case of land about to be transferred either by the person actually registered as proprietor of the land, with the consent in writing duly verified of the intended transferee, or by such transferee with the consent in writing duly verified of the registered proprietor. If the application relate to any leasehold land about to be registered, or to land about to be registered with an absolute or qualified title, the application and conditions shall be in accordance with the title examined by

(d) *Umlin & Key*, 52, 53. See *Spencer's case*, in 1 *Smith's Leading Cases*, 60 (7th ed., by Collins and Arbuthnot); *Malone v. Harris*, 11 Ir. Ch. Rep. 33.

the registrar, and if the application relate to any land about to be transferred, the conditions shall be in accordance with any conditions already registered. In any case of conditions being annexed on application under the 84th section, or on first registration as arising on the examination of title, a printed copy of the conditions, or of the document containing them, shall be left in the office, and the registration of such conditions may be made by reference on the register to such printed copy (e).

“On the registration of any leasehold land held under a lease, containing a prohibition against alienation without licence, provision shall be made for preventing alienation without such licence by an entry on the register of a reference to such prohibition.”

See Forms 32 and 33.

The fee for annexing conditions to land is 10s. The fee for the entry of any modification or discharge of conditions is also 10s.

The provisions of this section will be found useful by *building societies*.

SECTION 85.

Registered Lands to be within the Trustee Act, 1850.

All the provisions of the Trustee Act, 1850, and of any act amending the same, shall apply to land and charges registered under this act, but this enactment shall not prejudice the applicability to such land and charges of any provisions of such acts relating to land or choses in action.

Compare sect. 95 of the Land Registry Act, 1862.

SECTION 86.

Indemnity of Registrar.

The registrar shall not, nor shall the assistant registrar nor any person acting under his autho-

(e) The repetition of the conditions on each separate dealing is thus obviated. See Holt on Registration of Title, 114.

urity, or under any order or general rule made in pursuance of this act, be liable to any action, suit, or proceeding for or in respect of any act or matter *bonâ fide* done or omitted to be done in the exercise or supposed exercise of the powers of this act, or any order or general rule made in pursuance of this act.

In 1863, Mr. Nugent Ayrton, commenting on the defects of the Land Transfer Act of Lord Westbury (*f*), observed, that "some indemnity should be provided to the registrar in the exercise of his duties."

The suggestion of Mr. Ayrton has been carried out by this section.

The registrar is practically Judge of an English Landed Estates Court (*g*); and the assistant registrar may be regarded as the deputy-judge.

See section 121, *infra*, as to district registrars.

As to Married Women.

SECTION 87.

Provision as to Married Women.

Where a married woman, entitled for her separate use, and not restrained from anticipation, is desirous of giving any consent, or becoming party to any proceeding under this act, she shall be deemed to be an unmarried woman, but when any other married woman is desirous of giving any consent, or becoming party to any proceeding

(*f*) Treatise on the Transfer of Land Act. By E. N. Ayrton. 1863. Preface, p. viii.

(*g*) Holt on Registration of Title, 25, and see note, *supra*, to sect. 17.

under this act she shall be examined in the prescribed manner, and it shall be ascertained that she is acting freely and voluntarily, and the court may, where it sees fit, appoint a person to act as the next friend of a married woman for the purpose of any proceeding under this act, and may from time to time remove or change such next friend.

This section is copied from section 115, and the last clause of section 116, of the Land Registry Act, 1862, with this modification, that the Act of 1862 states that the examination may be taken under the 3 & 4 Will. 4, c. 74, while the present section leaves the mode of examination to be "prescribed" by General Orders, pursuant to sect. 111, *infra*.

The "manner" has been "prescribed" by the 60th General Rule, which contains the following provisions as to the examination of married women:—"When any married woman is to be examined under the act, in the case of any application to the office of land registry, such application shall be in writing, and the examination shall be made after such application is prepared, and in the case of any consent to be given by any married woman, or of any act to be done by her, or of her becoming a party to any proceeding in the office under the act, the matter or thing to which her consent is to be given, or the act to be done by her, or the proceeding to be taken, shall be reduced into or stated in writing before such examination be made, and the persons or person by whom such examination is made shall certify the result thereof to the satisfaction of the registrar. Such certificate may be to the effect following; that is to say,

" ' These are to certify that on the day of , 18 , before us , two of the perpetual commissioners appointed for the county of , for taking the acknowledgments of deeds by married women pursuant to an act passed in the third and fourth years of the reign of King William the Fourth, entitled 'An Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,' appeared personally , the wife of , and produced a paper writing, marked () bearing date the day of

, 18 , and identified by our signatures. And we do hereby certify that the said was, at the time of her producing the same paper writing, of full age and competent understanding, and that she was examined by us apart from her husband, touching her knowledge of the contents of the said paper writing, and of the nature and effect of the [*application, disposition, or other act, according to the effect of the paper writing*] therein mentioned, and that we ascertained she was acting with respect thereto freely and voluntarily [(*h*) and assented to the disposition, after full explanation of her rights in the land, and of the effect of the proposed disposition.]]'

"The paper writing mentioned in the certificate identified by the signatures of the persons making the examination, and the certificate, and, unless the registrar shall otherwise direct, a declaration verifying the certificate, and the signatures thereto of the persons by whom the same shall purport to be signed, shall be lodged in the office.

"Such declaration may be to the following effect :

" 'I, A. B., of , in the county of , [*make oath and say*] :—

" 'That I know , the wife of , in the certificate hereunto annexed mentioned, and that the said certificate was signed by , of , and , of , the commissioners in the said certificate mentioned, at , in the county of , in my presence.

" 'That to the best of my knowledge or belief, neither of the said commissioners is in any manner interested in the transaction giving occasion for such examination, or concerned therein as attorney (*i*), solicitor or agent, or as clerk to any attorney (*i*), solicitor or agent so interested or concerned.'

("Sworn or declared, &c.)

"The examination of any married woman may be made by the registrar or any person in the office authorized by him in

(*h*) To be inserted when the married woman is registered as co-proprietor with her husband.

(*i*) *Sic*.

writing, either in any particular case or generally, or by such persons as are authorized to take acknowledgments of deeds by married women under the act of the 3rd and 4th years of King William the Fourth, c. 74, 'for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.' "

See further, as to married women, sects. 44 and 83 (4), *supra*.

As to Infants and Lunatics.

SECTION 88.

Provision as to other Persons under Disability.

Where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding in relation to any land or charge under this act, is an infant, idiot, or lunatic, the guardian or committee of the estate respectively of such person may make such applications, give such consents, do such acts, and be party to such proceedings, as such person respectively, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of this act; where there is no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person is of unsound mind or incapable of managing his affairs, but has not been found lunatic under an inquisition, it shall be lawful for the court to appoint a guardian of such person for the purpose of any proceedings under this act, and from time to time to change such guardian.

This section is copied *verbatim* from the Land Registry Act of 1862, sect. 116. See sects. 76 and 77, *supra*.

As to Notices.

SECTION 89.

Address of Persons on Register.

Every person whose name is entered on the register as proprietor of land or of a charge, or as cautioner, or as entitled to receive any notice, or in any other character, shall furnish to the registrar a place of address in the United Kingdom.

This section is copied from sect. 124 of the Land Registry Act, 1862, "United Kingdom" being substituted for "England."

SECTION 90.

Service of Notices.

Every notice by this act required to be given to any person shall be served personally, or sent through the post in a registered letter marked outside "Office of Land Registry," and directed to such person at the address furnished to the registrar, and unless returned, shall be deemed to have been received by the person addressed within such period, not less than seven days, exclusive of the day of posting, as may be prescribed.

By the 53rd General Rule, "all notices and summonses required to be given or served for any purpose shall be prepared by the applicant on the official forms and under the stamp of the office. If the service of the notices or summonses be personal, it shall be proved by declaration; if the service be through the post, it shall be made by registered letter, and in such case open official envelopes, duly stamped and addressed, and marked outside 'Office of Land Registry,' and with the word 'Registered,' and containing the notices stamped, shall be left at the office for postage.

"Every notice required to be given shall, if sent through the

post, unless returned, be deemed to have been received by the person addressed within seven days, exclusive of the day of posting" (i).

"Served personally." By the 54th General Rule, "substituted service on the solicitor or agent of any person shall be deemed good service on such person, if the registrar shall so direct."

SECTION 91.

Return of Notices by Post Office.

Her Majesty's Postmaster-General shall give directions for the immediate return to the registrar of all letters marked as aforesaid, and addressed to any person who cannot be found, and on the return of any letter containing any notice, the registrar shall act in the matter requiring such notice to be given in manner prescribed.

By the 53rd General Rule, "on the return of any letter containing any notice, the registrar shall act in the matter requiring such notice to be given, in such manner as he shall think fit."

SECTION 92.

Purchasers not affected by omission to send Notices.

A purchaser for valuable consideration shall not be affected by the omission to send any notice by this act directed to be given, or by the non-receipt thereof.

(i) By General Rule 55, the registrar has power to "extend the time."

Specific Performance.

SECTION 93.

Power of Court in Suits for Specific Performance.

Where a suit is instituted for the specific performance of a contract relating to registered land, or a registered charge, the court having cognizance of such suit may by summons, or by such other mode as it deems expedient, cause all or any parties who have registered estates or rights in such land or charge, or have entered up notices, cautions, or inhibitions against the same, to appear in such suit, and show cause why such contract should not be specifically performed, and the court may direct that any order made by the court in such suit shall be binding on such parties, or any of them.

This section is new, and seems to provide a useful means of getting rid of a league of cautioners (*k*).

SECTION 94.

Costs in Suit for Specific Performance.

All costs incurred by any parties so appearing in a suit to enforce against a vendor specific performance of his contract to sell registered land or a registered charge, shall be taxed as between solicitor and client, and, unless the court otherwise orders, be paid by such vendor.

As to costs, see sections 68 and 73, *supra*.

(*k*) Mr. Holt, Registration of Title, 109, has indicated that the section will be also useful "in enabling an unregistered beneficial owner to compel a transfer by the registered proprietor to a purchaser of the beneficial interest."

Rectification of the Register.

SECTION 95.

Establishment of adverse Title to Land.

Subject to any estates or rights acquired by registration in pursuance of this act, where any court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision, such court is of opinion that a rectification of the register is required, such court may make an order directing the register to be rectified in such manner as it thinks just.

This is new. See sect. 21, *supra*. The fee for an application for the rectification of the register under this or the next section is 5s.; for rectification of the register, 10s. (1).

SECTION 96.

Register to be rectified under Order of Court.

Subject to any estates or rights acquired by registration in pursuance of this act, if any person is aggrieved by any entry made, or by the omission of any entry from the register under this act, or if default is made, or unnecessary delay takes place in making any entry in the register, any person aggrieved by such entry, omission, default, or delay may apply to the court in the prescribed manner for an order that the register may be rectified, and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of

(1) Schedule of Fees, Order of Dec. 30th, 1875.

the case, make an order for the rectification of the register.

"To the court;" or to the judge appointed under sect. 115. As to "the court," see sect. 114, and General Rule 63.

By the 59th General Rule, "upon any application to the court being made on the requirement of or appeal from the registrar, or for the rectification of the register, under the present section, a *statement* shall be prepared by the applicant and settled and signed by the registrar, and forwarded to the court through the office before the hearing. All applications to the court and appeals from the registrar shall be by *summons*. No appeal from a decision or order of the registrar, or of the court, shall affect any dealing for valuable consideration duly registered before a notice in writing of such appeal has been lodged in the office on the part of the appellant, and a note thereof made, on his application, in the register.

"No appeal shall be brought from a decision or order of the registrar, or of the court, after *twenty-eight days* from the date of such decision or order, without leave of the court.

"Service of any order or official copy order of any court on the registrar shall be made by leaving the same in the office, and an application shall be left at the same time for the rectification of the register being made, or any other act being done in accordance with such order, and the matter shall be proceeded with as the registrar shall direct."

SECTION 97.

Registrar to obey Orders of Court.

The registrar shall obey the order of any competent court, in relation to any registered land, on being served with such order, or an official copy thereof.

No similar provision was contained in the Land Registry Act, 1862. Mr. Umlin, commenting on sect. 101 of that act (m),

enabling the Court of Chancery to issue orders restraining any disposition of the registered land, observes: "This section and sect. 99, in terms give the court merely a negative or restraining power over the registrar, and the act does not expressly place him to any farther extent under the control of the court."

As to Fraud.

SECTION 98.

Fraudulent Dispositions.

Subject to the provisions in this act contained, with respect to registered dispositions for valuable consideration, any disposition of land, or of a charge on land, which, if unregistered, would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.

See and compare sects. 105 and 138 of the Land Registry Act, 1862, and sect. 100, *infra*.

"For valuable consideration." See as to *voluntary* dispositions, 13 Eliz. c. 5, and 27 Eliz. c. 4 (n).

SECTION 99.

Suppression of Deeds and Evidence.

If, in the course of any proceedings before the registrar or the court in pursuance of this act, any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, attempts to suppress, or is privy to the suppression of any document or of any fact, the

(n) As to the construction of the 91st section of the Bankruptcy Act, 1869, and 13 Eliz. c. 5, in relation to this act, see Holt on Registration of Title, 73.

person so suppressing, attempting to suppress, or privy to suppression, shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the court before which he is tried may award.

This section is taken from sect. 105 of the Land Registry Act, 1862, with some modifications; "with intent to conceal the title or claim of any person or to substantiate a false claim," being substituted for "with intent to deceive," and the sum of 500*l.* being fixed as the maximum fine, instead of leaving it in the discretion of the court to fix what fine it pleases. As to the effect of the suppression, see and compare sects. 105 and 108 of the Land Registry Act, 1862, and sect. 98, *supra*, and sect. 100, *infra*.

SECTION 100.

Certain Fraudulent Acts declared to be Misdemeanors.

If any person fraudulently procures, attempts to fraudulently procure, or is privy to the fraudulent procurement of any entry on the register, or of any erasure from the register or alteration of the register, such person shall be guilty of a misdemeanor, and upon conviction on indictment be liable to imprisonment for any term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the court before which he is tried may award; and any entry, erasure, or alteration so made by fraud, shall be void as between all parties or privies to such fraud.

This section is taken from sects. 138 and 139 of the Act of

1862, the words "of any caveat or notice of a charge" being, in two places, omitted after the word "register," so as to render the new crime applicable to *any* entry on or erasure from or alteration of the register; and the sum of 500*l.* being fixed as a maximum fine, instead of leaving it in the discretion of the court.

SECTION 101.

False Declarations.

If any person in any affidavit or declaration required or authorized to be made for any purpose under this act, or [under] any order or general rules made in pursuance thereof, wilfully makes a false statement in any material particular, he shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to imprisonment with or without hard labour, for any term not exceeding two years, or to be fined such sum not exceeding five hundred pounds as the court before which he is tried may award.

This section is taken from sects. 105 and 138 of the Land Registry Act, 1862, with certain modifications, precision being given to the definition of the new crime by any "affidavit" or "declaration," being substituted for any "proceeding" or "transaction," and 500*l.* being fixed as the maximum fine instead of leaving it in the discretion of the court to fix what amount of fine it pleases.

The word "under" requires to be inserted in this section before the words "any order;" it cannot have been intended that the framer of the "order" or "general rules" should be liable criminally for a false statement.

SECTION 102.

Saving of Civil Remedy.

No proceeding or conviction for any act declared by this act to be a misdemeanor shall

affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity.

This section is taken from the 106th section of the Land Registry Act, 1862, the words, "against the person who has committed such act," being omitted, so as to widen the application of the saving.

SECTION 103.

Saving of Obligation to make Discovery.

Nothing in this act contained shall entitle any person to refuse to make a complete discovery by answer in any legal proceeding, or to answer any question or interrogatory in any civil proceeding, in any court of law or equity, or in the courts of bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding under this act.

This section is copied from the 107th section of the Land Registry Act, 1862, the words, "under this act," being added, however, at the end.

Inspection of Register.

SECTION 104.

Inspection of Documents.

Subject to such regulations and exceptions and to the payment of such sums as may be fixed by general rules, any person registered as proprietor of any land or charge, and any person authorized

by any such proprietor, or by an order of the court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge.

This section is copied from sect. 137 of the Land Registry Act, 1862, "by general rules" being substituted for "by the registrar, with the sanction of the Lord Chancellor," and "by general rule" being added after the word "court." See also sect. 15 of that act. It will be convenient to introduce an express authority to inspect the register in any contract with a registered owner (*o*).

General Rule 57 provides, further, as follows:—"Every application to inspect any register or document in the custody of the registrar relating to any land or charge, or for copies of or extracts from the same, shall, if not made by the registered proprietor of such land or charge, be made *with his consent in writing. All copies or extracts shall be made by a clerk in the office.* No document not referred to in the register of the existing proprietorship shall be inspected without the consent of the registrar. *Any person may inspect any general index to the register in the office.* The registrar may permit such persons as he thinks proper to inspect and have copies of or extracts from the registered description."

It seems to have been assumed in settling the General Rules, that a parish and map index would be the only useful or practical index that could be kept at the office (*p*).

The fee for searching the index kept at the office is, for each parish, 2s. 6d.; for the inspection of the register by the registered proprietor, or with his consent, is, for each separate estate, 5s.; for the like inspection of the description only, 2s. 6d.; for inspection of the description with the registrar's consent, for each parish, 2s. 6d.; for the inspection of any document not referred to on the register, 2s. 6d. (*q*).

(*o*) Umlin & Key, 140.

(*p*) Holt on Registration of Title, 33.

(*q*) Schedule of Fees, Order, 30th Dec., 1875.

Saving Clause.

SECTION 105.

Saving Clause as to Escheat.

Nothing in this act contained shall affect any right of her Majesty to any escheat or forfeiture.

 PART V.

ADMINISTRATION OF LAW AND MISCELLANEOUS.

 (1.)—Office of Land Registry.

SECTION 106.

Office of Land Registry and Appointment and Payment of Officers.

There shall be an office in London to be called the Office of Land Registry (*r*), the business of which shall be conducted by a registrar to be appointed by the Lord Chancellor, with such number of officers (namely, assistant registrars, clerks, messengers, and servants) as the Lord Chancellor, with the concurrence of the Commissioners of her Majesty's Treasury as to number, may from time to time appoint.

A person shall not be qualified to be appointed registrar unless he is a barrister of not less than

(*r*) By the 6th General Rule "the holidays and vacations of the office shall be the same as those of the High Court of Justice, but the registrar shall make such arrangements as may be necessary for receiving during the vacations such applications and transacting such business as may require to be immediately attended to." As to the vacations of the High Court of Justice, see Order LXI. of the First Schedule to "The Supreme Court of Judicature Act, 1875;" and Charley's "Judicature Acts," 2nd ed., p. 534.

ten years' standing, and a person shall not be qualified to be appointed an assistant registrar unless he is either a barrister or solicitor or certificated conveyancer of not less than five years' standing.

The registrar, assistant registrars, clerks, messengers, and servants shall receive such salaries or remuneration as the Commissioners of her Majesty's Treasury may from time to time direct.

The salaries of the registrar, assistant registrar, clerks, messengers, and servants, and such incidental expenses of carrying this act into effect as may be sanctioned by the Commissioners of her Majesty's Treasury, shall be paid out of moneys provided by parliament.

The Lord Chancellor may from time to time make regulations for the office of land registry, and for assigning the duties to the respective officers, and determining the acts of the registrar which may be done by the assistant registrar, and may from time to time revoke and alter any such regulations, and make new regulations. All such regulations for the time being in force shall have effect as if they were enacted in this act.

The first clause of this section is taken from sect. 108 of the Land Registry Act, 1862. The maximum number of assistant registrars is fixed by that act at three. Only one has been appointed. The old act authorizes the appointment of "examiners of title."

See note to sects. 119 and 121, *infra*, as to the "qualification."

The second clause is taken from sect. 109 of that act, which does not, however, fix any qualification for the assistant registrar. The registrar must be a barrister. Members of both branches are eligible to be *assistant* registrars. By General Order, 1st October, 1862, under the old act, "any assistant registrar may act for the registrar." But see clause 5 of this section.

Clauses three and four are taken from sect. 111 of the old act.

The salary of the registrar is there fixed at 2,500*l.* per annum. See now sect. 123, *infra* (r).

Clause five is taken from sect. 123 of the old act, except that the Lord Chancellor is to make the regulations, instead of the registrar, with his concurrence. See the 123rd section of this act, *infra*, and the Order of the 24th December, 1875, cited under it.

SECTION 107.

Seal of Office of Land Registry.

There shall be a seal for the office of land registry.

This is copied from sect. 123 of the act of 1862:—"A seal shall be prepared for the Land Registry Office." By the Documentary Evidence Act (8 & 9 Vict. c. 113), sect. 1, proof of the seal is rendered unnecessary. See sect. 120, *infra*.

SECTION 108.

Registrar to frame and promulgate Forms.

Subject to the provisions of this act, the registrar shall conduct the whole business of registering land under this act; he shall frame and cause to be printed and circulated or otherwise promulgated such forms and directions as he may deem requisite or expedient for facilitating proceedings under this act.

The 55th General Rule expressly confers on the registrar the following discretionary powers:—"The registrar if he so think fit may extend the time limited by general rules for any purpose, and where the signing or execution of any document or instrument or any act is required by such rules to be attested

(r) Some useful observations on the inadequacy of the provision made for the registrar and assistant registrar will be found in Holt on Registration of Title, 125.

and verified or done by a solicitor, may accept such document or instrument, though not so attested or verified, and may give such directions in respect of such act, though not so done as he may think fit, and upon such terms and conditions (if any) in every such case as he may think proper.

“If at any time the registrar is of opinion that any further or other evidence is necessary or desirable, he may refuse to complete any dealing with the register until such further or other evidence has been produced.”

This act, unlike the Act of 1862, has no Schedule of Forms annexed to it. As to General Orders, see sect. 111.

The forms will be found in the Appendix. See the 58th General Rule, cited under sect. 111, *infra*. The forms (except the new Form 38) appear to have been issued under that section, not under this.

SECTION 109.

Power of Registrar to summon Witnesses.

The registrar or any officer of the registry office authorised by him in writing may administer an oath or take a voluntary declaration in pursuance of the acts in that behalf for any purposes of this act, and the registrar may, by summons under the seal of the office, require the attendance of all such persons as he may think fit in relation to the registration of any title; he may also, by a like summons, require any person having the custody of any map (*r*), survey, or book made or kept in pursuance of any act of parliament, to produce such map, survey, or book for his inspection; he may examine upon oath any person appearing before him and administer an oath accordingly; and he may allow to every person summoned by him the reasonable charges of his attendance (*s*).

(*r*) As to maps, see the 39th, 50th, and 51st General Rules.

(*s*) By the 52nd General Rule, “upon any summons being issued under the” present “section, the declaration verifying the

Any charges allowed by the registrar in pursuance of this section shall be deemed to be charges incurred in or about proceedings for registration of land, and may be dealt with accordingly.

The power to administer oaths and take statutory declarations had already been conferred on the registrar and assistant registrar by sect. 117 of the Land Registry Act, 1862. This section extends the power to "any officer of the registry office authorised by the registrar in writing." It appears to be the right interpretation that the power is only conferred in respect of transactions "in pursuance of the act," in the office of registry (*t*). General Orders 33 and 49 of 1st October, 1862, under the Act of 1862, empower the parties to swear affidavits and make statutory declarations before any commissioner appointed to take affidavits *in the Court of Chancery*. Except by giving notice the registrar appears to have had no power, under the Act of 1862, to procure the attendance of witnesses before him. This defect in the law is remedied by the present and the following sections, which are very useful enactments. Reference has already been made to the equally useful enactment empowering the registrar to order the production of title deeds. See the 71st section and the note thereto. No appeal lies from the registrar under the present section. As to taking "declarations" in the office, see General Rule 46. As to "charges," see section 73, *supra*.

SECTION 110.

Non-Attendance or Refusal to answer Questions.

If any person, after the delivery to him of such summons as aforesaid, or of a copy thereof, wil-

service thereof *shall* also prove that the reasonable charges of the attendance of the person summoned, and of his production of the documents (if any) required to be produced, have been paid or tendered to him." See the next section.

(*t*) Umlin & Key, 125.

fully neglects or refuses to attend in pursuance of such summons, or to produce such maps, surveys, books or other documents as he may be required to produce under the provisions of this act, or to answer upon oath or otherwise such questions as may be lawfully put to him by the registrar under the powers of this act, he shall incur a penalty not exceeding twenty pounds, to be recovered on summary conviction; provided that no person shall be required to attend in obedience to any summons or to produce such documents as aforesaid unless the reasonable charges of his attendance and of the production of such documents be paid or tendered to him.

This section prescribes the method by which the provisions of the previous section may be enforced, and the authority of the registrar be upheld (*u*). The previous section says, that the registrar *may* allow *every* person summoned by him the reasonable charges of his attendance. This section says, that these charges, *and also* the reasonable charges of the production of the documents, *must* be paid and tendered to the person summoned, before any steps can be taken for his summary conviction for non-attendance or non-production (*v*).

SECTION 111.

Power of Lord Chancellor to make General Rules.

Subject to the provisions of this act, the Lord Chancellor may, with the advice and assistance of the registrar, from time to time make, and when made may rescind, annul, or add to, GENERAL

(*u*) Under sects. 71 and 73, *supra*, the remedy for disobedience of the order of the registrar is attachment for contempt of court.

(*v*) See also General Rule 52, cited under the last section.

RULES in respect of all or any of the following matters; that is to say,

- (1.) The mode in which the register is to be made and kept; and
- (2.) The forms to be observed, the precautions to be taken, the instruments to be used, the notices to be given, and the evidence to be adduced in all proceedings before the registrar or in connexion with registration, and in particular with respect to the reference to a conveyancing counsel of the Court of Chancery of any title to land proposed to be registered with an absolute title; and
- (3.) The custody of any instruments from time to time coming into the hands of the registrar, with power to direct the destruction of any such instruments where they have become altogether superseded by entries in the register, or have ceased to have any effect:
- (4.) The costs to be charged by solicitors or certificated conveyancers in or incidental to or consequential on the registration of land, or any other matter required to be done for the purpose of carrying this act into execution, with power to require such costs to be payable by commission, per-centage, or otherwise, and to bear a certain proportion to the value of the land registered, or to be determined on such other principle as may be thought expedient; and
- (5.) The taxation of such costs and the persons by whom such costs are to be paid; and
- (6.) Any matter by this act directed or authorised to be prescribed; and
- (7.) Any other matter or thing, whether similar

or not to those above mentioned, in respect of which it may be expedient to make rules for the purpose of carrying this act into execution :

Any rules made in pursuance of this section shall be deemed to be within the powers conferred by this act, and shall be of the same force as if enacted in this act, and shall be judicially noticed.

Any rules made in pursuance of this section shall be laid before both houses of parliament within three weeks after they are made, if parliament be then sitting, and if parliament be not then sitting, within three weeks after the beginning of the then next session of parliament.

Under the Act of 1862, the General Orders were framed by advice and assistance of *the registrar*, "with the sanction and under the direction of the Lord Chancellor." See sects. 125, 126 and 133 of that act. The General Rules under the present act have been framed by the Lord Chancellor, "with the advice and assistance of the registrar." They will be found in the Appendix.

(1) The 56th General Rule prescribes "the mode in which the register is to be made and kept:—

"The register shall be made and kept in such mode that *in every case* where there is a registered proprietor of land, such land and any transactions relating thereto authorised to be entered on the register shall form *a separate record in the register*, or in such other manner as the registrar shall determine. The registrar may withdraw from the register, by cancellation or otherwise, any notice or entry which he is satisfied no longer affects the registered land. No entry in the register shall be set aside or called in question by reason of any irregularity or informality in any proceeding previous to the making thereof."

(2) The 58th General Rule prescribes "the forms to be observed" (x):—

"The forms in the schedule hereto shall be used in all matters

(x) These forms will be found in the Appendix.

to which they refer or are capable of being applied or adapted, with such alterations and additions only as are necessary to meet the circumstances of each case, but no recital, reservation, covenant, declaration, or other provision not referred to in or required by such forms, shall be inserted therein. Official copies of the forms may be supplied through the office, and may, where practicable, be used in all matters to which the forms relate. The registrar may reject any document which is informal, or which he may consider is not in accordance with this rule."

"The precautions to be taken." See, *e. g.*, General Rules 7 (Verification of Description); 46 (Verification of Instruments); 12 (Statement of Title); 38 (Applications to be signed); 39 (Further Extracts from Public Maps); 42 (Verification of Powers of Attorney), &c.

"The instruments to be used." See, *e. g.*, General Rules 20 (Instruments of Charge); 21 (Instruments transferring Charge); and 23 (Instruments of Transfer of Land), &c.

"The notices to be given." See, *e. g.*, General Rules 10 (Advertisement and Notice of Application); 13 (Notices to Objectors); 15 and 16 (Notices of Cautions); 36 (Notice as to Questions arising during Registration); and 53 (Preparation and Service of Notices).

"The evidence to be adduced." See, *e. g.*, General Rules 4 (Production of Documents); 6 (Possessory Title); 8 (Abstracts and Proofs); 25 (Evidence of Transmission of Registered Proprietorship); 26 (Evidence of Death or Marriage of Proprietor); 32 (Evidence of Grant); and 55 (Further Evidence), &c.

"Reference to a conveyancing counsel of the Court of Chancery of any title to land proposed to be registered with an absolute title." This has been expressly provided for by the 9th General Rule, which declares that "the registrar may, if he so think fit, refer any title, the examination of which is required to be made by him, or any points arising therein, to either the examiner of title under the Land Registry Act, 1862, or to one of the conveyancing counsel of the Chancery Division of the High Court of Justice. The costs of such examination, and of proving the title, and of searches and inquiries in relation thereto, and the fees of any conveyancing counsel to whom any

title, or points arising thereon, may be referred shall be paid by the applicant" (y).

(3) "The custody of any instruments from time to time coming into the hands of the registrar." See, *e.g.*, General Rules 34 (Retention of Lease or Copy of it), and 40 (Abstracts and Documents to be Retained).

"With power to direct the destruction of any such instruments where they have become altogether superseded by entries on the register or have ceased to have any effect." This is expressly provided for by General Rule 43, which declares that "the registrar may direct the destruction of any instruments in his possession or custody where they have become altogether superseded by entries in the register or have ceased to have any effect."

(4) "The costs to be charged by solicitors and certificated conveyancers." The Lord Chancellor has not yet issued any general order as to solicitors' and certificated conveyancers' costs, in pursuance of this authority.

(5) "The taxation of such costs." See notes to the preceding subsection and General Rule 73.

(6) "Any matter by this act directed or authorised to be *prescribed*." See, *e.g.*, as to "the prescribed number," sects. 5 and 83 (2) and General Rule 37; "the prescribed evidence and notices," sect. 6 and General Rules 4, 8, 10, 13, 15, 16, 36, 53, &c.; "the prescribed form," sects. 10, 22, 29, and General Rule 33; "the prescribed manner," *passim*.

(7) The terms of this subsection are extremely wide, but they must be taken in connexion with the limitation at the beginning of this section, "subject to the provisions of this act."

SECTION 112.

Principles on which Fees determined.

The Lord Chancellor may from time to time,

(y) In Mr. Holt's opinion (Registration of Title, 157), as a rule, the registrar would probably not refer a title to counsel, where it had been recently advised on by counsel on points requiring particular attention under the act.

with the concurrence of the Commissioners of the Treasury, make, and when made revoke, alter, or add to, rules with respect to the amount of fees payable under this act, regard being had to the following matters :

- (1.) In the case of the registration of land or of any transfer of land on the occasion of a sale,—to the value of the land as determined by the amount of purchase-money ; and
- (2.) In the case of the registration of land, or of any transfer of land not upon a sale,—to the value of the land, to be ascertained in such manner as may be prescribed ; and
- (3.) In the case of registration of a charge or of any transfer of a charge,—to the amount of such charge.

Subsections (1), (2), and (3), of the present section are copied *verbatim* from the 128th section of the Land Registry Act, 1862. By section 127, however, of that act, “ the registrar, with the sanction of the Lord Chancellor,” was to fix the scale of fees, which he accordingly did by an order dated the 1st of October, 1862.

On the 30th of December, 1875, Lord Cairns, C., issued, with the concurrence of the Commissioners of the Treasury, the following Schedule of Fees under the present section (z):—

	£	s.	d.
For every abstract lodged in the office	0	10	0
For examination of abstract with deeds, where made by clerks in the office, for every hour or part of an hour so engaged	0	5	0
For the entry of first proprietorship, if the value of the property does not exceed 1,000 <i>l.</i> , for every 100 <i>l.</i> or fractional part of 100 <i>l.</i> of the value thereof ..	0	5	0
If the value exceed 1,000 <i>l.</i> , but does not exceed			

(z) “ The fees have been fixed on the same *low scale* as those payable under the Act of 1862.” Holt on Registration of Title, 131.

	£	s.	d.
5,000 <i>l.</i> , then for the first 1,000 <i>l.</i> at the rate aforesaid, and for every additional 100 <i>l.</i> or fractional part of 100 <i>l.</i> of the value thereof beyond the first 1,000 <i>l.</i>	0	3	0
If the value exceed 5,000 <i>l.</i> , but does not exceed 20,000 <i>l.</i> , then for the first 5,000 <i>l.</i> at the rate aforesaid, and for every additional 100 <i>l.</i> or fractional part of 100 <i>l.</i> of the value thereof beyond the first 5,000 <i>l.</i>	0	2	0
If the value exceed 20,000 <i>l.</i> , then for the first 20,000 <i>l.</i> at the rate aforesaid, and for every additional 100 <i>l.</i> and fractional part of 100 <i>l.</i> of the value thereof beyond 20,000 <i>l.</i>	0	1	0
In the case of a possessory title	Half of such of the above fees as are applicable.		
For every land certificate or office copy lease:—			
If the value of the property comprised therein does not exceed 1,000 <i>l.</i>	0	7	0
If the value exceed 1,000 <i>l.</i> , but does not exceed 5,000 <i>l.</i>	0	15	0
If the value exceed 5,000 <i>l.</i> , but does not exceed 10,000 <i>l.</i>	1	0	0
If the value exceed 10,000 <i>l.</i> , but does not exceed 20,000 <i>l.</i>	2	0	0
If the value exceed 20,000 <i>l.</i> , but does not exceed 40,000 <i>l.</i>	3	0	0
If the value exceed 40,000 <i>l.</i>	5	0	0
For every special land certificate	0	5	0
For altering land certificate under 29th section	0	10	0
For an endorsement under 34th section on an office copy registered lease, not being then first issued	0	10	0
For every new land certificate or office copy of registered lease, where the original certificate or office copy is lost, mislaid or destroyed.	The same fee as on an original certificate or office copy.		
For every certificate of charge	0	5	0
For the registration of any change of proprietorship of land (except under the 43rd section), if the value does not exceed 1,000 <i>l.</i>	0	5	0
If the value exceed 1,000 <i>l.</i> , then for the first 1,000 <i>l.</i> at the rate aforesaid, and for every additional 500 <i>l.</i> or fractional part of 500 <i>l.</i> of the value thereof beyond the first 1,000 <i>l.</i>	0	1	0
For registration of every charge or transfer, or transmission of charge (except under the 43rd section), where the principal sum does not exceed 1,000 <i>l.</i>	0	2	6
If the principal sum exceed 1,000 <i>l.</i> , then for the first 1,000 <i>l.</i> at the rate aforesaid, and for every			

	£	s.	d.
additional 500 <i>l.</i> or fractional part of 500 <i>l.</i> of the amount of such charge beyond 1,000 <i>l.</i> ..	0	0	6
For any entry in respect of a deposit of a land certificate.	The same fee as for a charge for the amount secured by the deposit.		
For entry of notice of lease or agreement where the term granted or agreed to be granted exceeds 21 years	0	5	0
Where the term does not exceed 21 years	0	2	6
For notifying the determination of any lease or charge	0	7	0
For notifying cessation of incumbrance	0	7	0
For every caution, whether before or after registration	1	0	0
For entry of restrictions under the 58th section ..	1	0	0
For withdrawal or modification of restrictions ..	0	7	0
For every order or entry made under 57th section ..	1	0	0
For removal of any caution	0	7	0
For every entry under third clause of 83rd section ..	0	10	0
For every entry of change of proprietorship under 43rd section	0	10	0
For every entry under the 18th section (if made after first registration)	0	10	0
For entry of any grant of rent under second paragraph of 82nd section, if land affected thereby be registered with an absolute or qualified title.	The same fee as for the first entry of land with an absolute or qualified title of the value of the rent at 30 years' purchase.		
If such land be registered with a possessory title.	The same fee as for the first registration of land with a possessory title of the value of the rent at 30 years' purchase.		
For any entry under 52nd section	The same fee as for a charge of the same value as the estate to be entered, to be ascertained as the Registrar may direct.		
For any entry negating implied covenants, powers or priorities, on charge or transfer of any freehold or leasehold land under the provisions of the act ..	0	10	0
For annexing conditions to land	0	10	0
For entry of modification or discharge of conditions ..	0	10	0
For every entry on the register for which no other fee is provided	0	5	0
For application for rectification of the register under the 95th or 96th sections	0	5	0
For rectification of register under 95th or 96th sections	0	10	0
For every statement for the court signed by the registrar	0	10	0

	£	s.	d.
For every examination of a married woman in the office	0	10	0
For inspection of register by the registered proprietor, or with his consent, for each separate estate ..	0	5	0
For the like inspection of description only, for each separate estate	0	2	6
For searching index kept in the office for each parish	0	2	6
For inspecting the description, with the consent of the registrar for each parish	0	2	6
For inspection of any document not referred to on the register	0	2	6
For every affidavit or declaration filed in the office ..	0	2	6
For every summons to attend the registrar	0	3	0
For every notice under the official stamp	0	1	0
For every affidavit or declaration sworn or taken in the office	0	1	6
For every exhibit marked in the office	0	1	0
For office extract from, or copy of, any entry in the register, if not exceeding one folio	0	5	0
For every additional folio or part of a folio	0	2	6

STATIONER'S CHARGES, &c.

For copy of any document, per folio or part of a folio	0	0	2
For every office copy, per folio or part of a folio. (In the case of an office copy lease this fee is payable in addition to the fee above charged)	0	0	4
For every entry in the register of proprietorship or in the register of parcels, or engrossment of or alteration in land certificate, per folio or part of a folio	0	0	6
For envelopes, or stamping same with the office stamp, each	0	0	1
The stationer's charge for tracings or copies of maps is payable by the applicant.			

By the 45th General Rule it is also provided, that "all copies, entries, engrossments, or other writing made by a stationery clerk in the office, or by the office stationer, and all stationery and forms supplied by the office in the course of registration, shall be paid for by the applicant. Such charges shall be paid in stamps."

See, as to the mode of collecting fees, sect. 129 of the Land Registry Act, 1862, and the next section.

SECTION 113.

Mode of taking Fees.

The following rules shall be observed with respect to the fees payable in pursuance of this act:

- (1.) The fees shall, except so far as the Lord Chancellor, with the concurrence of the Commissioners of her Majesty's Treasury, may from time to time otherwise direct, be taken by stamps; and if not taken by stamps, shall be taken, applied, accounted for, and paid over in such manner as may be directed by the Commissioners of her Majesty's Treasury with the concurrence of the Lord Chancellor; and
- (2.) Such stamps shall be impressed or adhesive as the Commissioners of her Majesty's Treasury from time to time direct; and
- (3.) The Commissioners of her Majesty's Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for regulating the use of such stamps, and for insuring the proper cancellation of stamps, and for keeping accounts of such stamps; and
- (4.) The Commissioners of Inland Revenue shall keep a separate account of all money received in respect of stamps under this act, and, subject to the deduction of any expenses incurred by those Commissioners in the execution of this act, the money so received shall, under the direction of the Commissioners of her Majesty's Trea-

surey, be carried to and form part of the Consolidated Fund;

- (5.) Any person who forges or counterfeits any such stamp, or uses any such stamp, knowing the same to be forged or counterfeited, or to have been previously cancelled or used, shall be guilty of forgery, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years.

See and compare sect. 129 of the Registry of Land Act, 1862, and General Order to that act, 1st October, 1862, Nos. 44 and 48.

Sect. 26 of the Supreme Court of Judicature Act, 1875, contains precisely similar provisions copied from the 28 & 29 Vict. c. 45, and 32 & 33 Vict. c. 91, ss. 19—23.

Sub-section (5) creates a new crime. There is no corresponding provision in the Land Registry Act, 1862.

By the 45th General Rule it is provided as follows:—"No entry shall be made on the register before the stamps in respect of the fees payable under the act, and any rules thereunder, have been impressed or affixed on some document sent to or lodged in the office with reference to the proposed registration, or as the registrar shall direct, and all expenses payable under the act and rules have been provided for.

"For the purpose of determining the stamps in any case where the value of the land does not appear to the satisfaction of the registrar, and is required to be known, the registrar may require such evidence to be furnished as he may think fit of the value of the land.

"Every officer of the land registry who shall receive any document to or upon which a stamp shall be affixed or impressed, under the act or rules, shall immediately on receipt of such document deface the stamp thereon. The registrar may refuse to receive in the office any document requiring to be and not duly stamped."

Description and Powers of the Court.

SECTION 114.

“The Court” to mean according to circumstances Court of Chancery and County Court.

For the purposes of this act, “the court” shall mean the Court of Chancery or the county court, according as the one or other of such courts may be prescribed by the general rules made for carrying into effect this act.

The county court shall, in cases where it has jurisdiction under this act, have, for all the purposes of such jurisdiction, all the powers of the Court of Chancery.

Any jurisdiction of the Court of Chancery or county court under this act may be exercised by any judge of the said court, whether sitting in open court or in chambers.

The General Rules contain no reference to the county courts. General Rule 63 provides that “‘the court,’ *in the rules and forms*, shall mean ‘the Supreme Court of Judicature.’” The Court of Chancery now no longer exists (see sect. 3 of the Supreme Court of Judicature Act, 1873), and *any division* of the High Court of Justice would now, it seems, be competent to hear applications and appeals under this act.

The addition to the county court jurisdiction is new; the object, no doubt, of introducing the county court is to facilitate registration in the *district registries* (a), when established. See sect. 118. As to the appeal from county courts, see sect. 116, *infra*.

The last clause is copied from sect. 134 of the Land Registry Act, 1862.

See, further, as to definitions, sect. 4, *supra*.

(a) See as to this, however, Holt on Registration of Title, 134, 139.

SECTION 115.

Lord Chancellor may assign Duties as to Registry to particular Judges.

The Lord Chancellor may from time to time assign the duties vested in the Court of Chancery in relation to matters under this act to any particular judge or judges of that court.

This section is copied *verbatim* from the 121st section of the Land Registry Act, 1862. The "judge of the Court of Chancery" selected by Lord Westbury, C., under that section was the Master of the Rolls. No chancery judge has been selected under this section.

SECTION 116.

Appeal from County Court.

Any person aggrieved by any order of a judge of a county court may, within the prescribed time and in the prescribed manner, appeal to the Court of Chancery.

The court on hearing such appeal may give judgment affirming, reversing, or modifying the order appealed from, and may finally decide thereon, and make such order as to costs in the court below and of the appeal as may be agreeable to justice; and if the court alter or modify the order, such order so altered or modified shall be of the like effect as if it were the order of the County Court. The Court of Chancery may also, in cases where the court thinks it expedient so to do, instead of making a final order, remit the case, with such directions as the court may think fit, to the court below.

This section must be read in connexion with sect. 114, *supra*, and sect. 118, *infra*. No "time" or "manner" has yet been "prescribed."

SECTION 117.

Appeal from Court of Chancery.

Any person aggrieved by an order made under this act by the Court of Chancery, otherwise than on appeal from a county court, may appeal within the prescribed time, in the same manner and with the same incidents in and with which orders made by the Court of Chancery on cases within the ordinary jurisdiction of such court may be appealed from.

But see sect. 75. See also sect. 134 of the Land Registry Act, 1862. An appeal will lie direct from the judge at Chambers to the Court of Appeal. (Morgan's Chancery Acts, 3rd ed. 146.)

By the 59th General Rule, "no appeal from a decision or order of the court shall affect any dealing for valuable consideration duly registered before a notice in writing of such appeal has been lodged in the office on the part of the appellant, and a note thereof made, on his application, in the register."

"Within the prescribed time." By the 59th General Rule, "no appeal shall be brought from a decision or order of the court, after *twenty-eight days* from the date of such decision or order, *without leave of the court.*"

As to District Registries.

SECTION 118.

Power to form District Registries by General Orders.

The Lord Chancellor, with the concurrence of the Commissioners of her Majesty's Treasury, shall have power by general orders from time to time to do all or any of the following things:—

- (1.) To create district registries for the pur-

poses of registration of land within the defined districts respectively, and to alter any districts which shall have been so created ; and

- (2.) To direct, by notice to be published in the "London Gazette," when (upon or after the commencement of this act) registration of land is to commence in any district, and the place at which lands are to be registered; and
- (3.) To commence registration of land in any one or more district or districts, pursuant to any such notice; and
- (4.) To appoint district registrars, assistant district registrars, clerks, messengers, and servants to perform the business of registration in any district which may from time to time be created a district for registration under this act.

The Lord Chancellor may, with the like concurrence, from time to time make, rescind, alter, or add to any order made in pursuance of this section.

No General Order has been made under this section for the establishment of district registries. The explanation of this appears to be, that the establishment of district registries is ancillary to a scheme of compulsory registration, and such a scheme has been, for the present, abandoned.

SECTION 119.

Qualification of the District and Assistant District Registrar.

A person shall not be qualified to be appointed district registrar under this act unless he is a barrister, or solicitor, or certificated conveyancer of

not less than ten years' standing, and a person shall not be qualified to be appointed an assistant district registrar under this act unless he is either a barrister, or solicitor, or certificated conveyancer of not less than five years' standing. A district registrar or assistant district registrar may, with the assent of the Lord Chancellor, follow another calling.

Compare sect. 106, *supra*—qualifications of registrar and assistant registrar. Members of both branches of the legal profession are, it will be seen, eligible under this section. The qualification of the district registrars is, oddly enough, much higher than that of the assistant registrar, sect. 106.

The registrars of the county courts will probably be selected as district registrars, should England be mapped out into districts for the purposes of registration of title under the act (b).

SECTION 120.

Seal for District Registry.

A seal shall be prepared for each district registry office, and any instrument purporting to be sealed with such seal shall be admissible in evidence, and if a copy, the same shall be admissible in like manner as the original.

See note to sect. 107.

SECTION 121.

Powers of District Registrar, and Appeals from him.

Subject to general rules each district registrar and assistant district registrar shall, as regards the

(b) See a valuable note to sect. 122, Holt on Registration of Title, 138—140.

land within his jurisdiction, have the same powers and indemnity as are herein given to the registrar and assistant registrar in the office of land registry, and there shall be the same appeal as in the case of the registrar; and any orders made by a district registrar or assistant district registrar may in like manner be made orders of, and be enforced by the court: provided always, that the Lord Chancellor may, by general rules, make provision for the duties of district registrar, as regards all or any of the proceedings preliminary to first registration, or as regards any matters which the district registrar has to determine, or any other matters, being performed by the registrar or assistant registrar in the office of land registry, and for any district registrar, in any cases obtaining directions from or acting with the sanction of such registrar or assistant registrar; and any such orders may from time to time be rescinded, altered, or annulled by the Lord Chancellor, and all orders made in pursuance of this section shall be of the same force as if inserted in this act, and shall be judicially noticed.

The indemnity clause for the registrar and assistant registrar is sect. 86, *supra*.

It seems extraordinary that the qualification of the assistant registrar should be lower than that of a district registrar, who may have to "obtain directions" from him. Under sect. 123, the existing assistant registrar is to "rank above" all district registrars.

SECTION 122.

Application of General Orders, &c. to Districts.

The general orders, rules, forms, directions, and fees for the time being applying to and payable in the office of land registry shall also apply to and

be payable in all the district registries, subject to any alteration or addition for the time being made for any district by the Lord Chancellor, with the concurrence of the Commissioners of her Majesty's Treasury as to fees.

As to "General Orders" see sects. 3 and 118; as to "Rules," sects. 3, 111, 112 and 121. No "forms" or "directions" are appended to the act; but by sect. 108, *supra*, the registrar has power to frame "forms and directions."

The General Rules and Forms issued under the 111th, 112th, 123rd, and 126th sections will be found in the Appendix. The General Rules will also be found under the appropriate sections.

(2.)—Temporary Provisions.

SECTION 123.

Transfer of existing Staff to new Registry Office.

The registrar, assistant registrar, examiners of title, clerks, messengers and servants at the time of the commencement of this act attached to the office of land registry, shall from and after the commencement of this act be attached to the office of land registry as constituted by this act.

The registrar and other officers and persons so attached shall have the same relative rank, such rank being in the case of the assistant registrar above the rank of any other assistant registrar or any district registrar who may be appointed in pursuance of this act, and hold their offices by the same tenure and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions or superannuation allowances, be entitled to the same pensions or superannuation allowances, as if this act had not passed;

and their service under this act shall, as regards their claim to pension or superannuation allowance be deemed a continuance of their former service, but in the event of any such officer being appointed to a new office in pursuance of this act service under the Land Registry Act, 1862, shall be deemed to be service under this act for the purposes of entitling such last-mentioned officer to salary, superannuation, compensation, gratuity, or other allowances under the Superannuation Acts. The messengers and servants of the office of land registry shall, during the tenure of office by the existing registrar, be appointed and removed by him.

The Lord Chancellor may, by rules, distribute the business to be performed in the office of land registry as constituted under this act amongst the several officers attached thereto by this section, in such manner as he may think just; and such officers shall perform such duties in relation to such business as may be directed by such rules, with this qualification, that the duties required to be performed by any officer shall be the same as or duties analogous to those which he performed previously to the passing of this act.

The officers so attached as aforesaid, and their successors in office, shall for all the purposes of the Land Registry Act, 1862, so far as it will remain in operation after the passing of this act, and for all the purposes of the Improvement of Land Act, 1864, and of the Mortgage Debenture Act, 1865, be deemed to be officers acting under the Land Registry Act, 1862, and having to discharge the duties belonging to officers acting under such act.

The following is the list of the names of the existing staff

of the Office of Land Registry contained in the current number of the *Law List*(c):—

“OFFICE OF LAND REGISTRY,
“31, Lincoln’s-inn-fields, W.C.(d).

“Hours—10 to 4; Saturdays, 10 to 2.

“*Registrar*, Brent Spencer Follett, Esq., Q.C.

“*Assistant-Registrar*, Robert Hallett Holt, Esq.

“*Examiners of Title*, Charles Davidson and Arthur Burrows, Esqs.

“*Chief Clerk*, Mr. O. D. Mordaunt.

“*Clerks*, Messrs. W. H. Emmet and G. Abbott.”

It will be seen that the staff is but a small one, especially in view of the work which will still have to be performed under the Land Registry Act, 1862(e). No doubt it will, ultimately, be augmented under sect. 106, *supra*. The concurrence, however, of the Treasury will be necessary to any increase “as to number.”

By a Rule dated the 24th December, 1875, but which took effect on the 1st January, 1876 (see sect. 3, *supra*), the Lord Chancellor distributed the business to be performed in the office of Land Registry, as constituted under the act, amongst the several officers, under the present section, as follows:—“The registrar shall perform the duties of registrar under the act. The assistant registrar shall, in the absence of the registrar, perform the duties of registrar under the act, other than and except the duties hereinafter mentioned, and shall, when the registrar is present, act in aid of the registrar and subject to his directions. But the registrar alone shall be entitled to perform the following acts, viz.:—

- (a.) To approve of an absolute or qualified title in reference either to freehold or leasehold land:
- (b.) To inhibit dealings with registered land:
- (c.) To order production of deeds:
- (d.) To state a case for the opinion of the court:
- (e.) To direct substituted service.

The other officers shall, under the direction of the registrar, or

(c) Page 896 (1876).

(d) The original address of the office was 34, Lincoln’s-inn-fields.

(e) See Holt on Registration of Title, 143.

in his absence of the assistant registrar, perform such duties in relation to the business under the act as shall be the same as, or duties analogous to, those which they respectively performed previously to the passing of the act."

"The Mortgage Debenture Act, 1865," is the 28 & 29 Vict. c. 78. See the General Orders issued under that act by the registrar at p. 71 of the former "Directions," 1866.

SECTION 124.

Transfer of Books and Papers.

All books, documents, and papers in the possession of the office of land registry as constituted before the passing of this act, or of any person attached to or performing any ministerial duty in aid of such office, shall be dealt with in such manner as the Lord Chancellor may by order direct, and any person failing to comply with any order of the Lord Chancellor made for the purpose of giving effect to this section, shall be punished in the same manner as if he had been guilty of a contempt of the Court of Chancery.

No order has been issued under this section. The books, documents, and papers remain where they were, *i. e.*, in the old office, which is also the office under this act.

SECTION 125.

Registration under Act of 1862 to cease after the Commencement of this Act.

From and after the commencement of this act, application for the registration of an estate under the Land Registry Act of 1862 shall not be entertained.

This section restricts the old register to the estates, application for the registration of which was made prior to the 1st of

January, 1876; and the persons who own these estates will have an option under the next section of re-registering under the present act without any expense. This section is not in accordance with the recommendations of the Land Transfer Commission, 1869 (*f*).

Dealings with estates registered under the Land Registry Act, 1862, and not registered under the next section, will have to be entered up in the old register, which, so far, will remain open.

Original applications for first registrations under the Land Registry Act, 1862, made *prior* to the 1st January, 1876, can, of course, be continued and completed under that act (*g*).

SECTION 126.

Possible Re-registry of Estates already Registered under the Act of 1862.

From and after the commencement of this act the Lord Chancellor may, by order, provide for the registration under this act, without cost to the parties interested, of all titles registered under the Land Registry Act, 1862, and care shall be taken in such order to protect any rights acquired in pursuance of registry under such last-mentioned act, and any order so made by the Lord Chancellor shall have the same effect as if it were enacted in this act; nevertheless it shall not be obligatory on any person interested in an estate registered under the said Land Registry Act, 1862, to cause such estate to be registered under this act, and until such estate is registered under

(*f*) Paras. XXVIII. and XXXII. "Any person coming to register fresh land may have his choice whether he will proceed under the old registry or the new."

(*g*) As to the number of "separate estates" appearing on the old register, see Holt on Registration of Title, 143.

this act, the act of 1862 shall apply thereto in the same manner as if this act had not passed.

This section is in accordance with the recommendations of the Land Transfer Commission, 1869. (See p. XXX. of their Report.)

By virtue and in pursuance of this section the Lord Chancellor has made the following Orders, which bear date the 1st January, 1876:—

“1. Any person or persons appearing from the register kept pursuant to the Act of the 25 & 26 Vict. c. 53, hereinafter called ‘The Land Registry Act, 1862,’ to be entitled to such an estate or interest as would enable him or them to make an original application under ‘The Land Transfer Act, 1875’ (hereinafter called the principal Act), to be registered as first proprietor or first proprietors, or to have a nominee or nominees registered in his or their stead if not registered under ‘The Land Registry Act, 1862,’ or if there be no such person or persons, then any person or persons appearing from the said register to be beneficially interested, may at any time after the commencement of the principal act, and with the consent of such persons, if any, as the registrar may think proper, apply to be registered, or (if the case so admit) to have registered in his or their stead a nominee or nominees as proprietor or proprietors, and the registrar may register him or them in the same manner, and with the same incidents in and with which the registrar is by the principal act empowered to register the proprietorship of land, and such registration shall be made *without the payment of any official fees*.

“2. Upon any application under these Orders the registrar may dispense with any of the proceedings under the General Rules made under the principal act as he shall consider proper to be dispensed with, and the matter shall be proceeded with as the registrar shall direct.

“3. Upon any registration being made under these Orders, the register under ‘The Land Registry Act, 1862,’ shall be closed, and a note made thereon that the land is registered under the principal act. And the registry under the principal act shall be subject to the entries in the said register at the closing

thereof, and to any rights acquired in pursuance of registry under 'The Land Registry Act, 1862.'

" 4. The registrar may, at any time after the said register has been closed, direct the delivery out of office copies of or from the register as at the date of the closing thereof, to any person who shall satisfy him that the same ought to be delivered to him; and such office copies shall be *primâ facie* evidence of the entries contained in the register in respect of the several matters mentioned in such office copies.

" 5. Any person aggrieved by any order of the registrar under these Orders may appeal to the Court in the manner provided by the General Rules of the 24th day of December, 1875" (*h*).

The following "declaration on registration" has recently been issued:—

" No.

" The Land Transfer Act, 1875.

" Office of Land Registry.

" In the matter of the application of

" I, of do solemnly and sincerely declare that I have not been party or privy to any sale, mortgage, deed, instrument, act or thing under or by virtue of which any estate or interest, contract or engagement, for the registration whereof provision is made by the Act of 25 & 26 Vict. c. 53 (*i*), is now subsisting or capable of taking effect in the hereditaments the subject of this application and registered under the last-mentioned act under the No. , or in any part of the said hereditaments which is not entered or mentioned in the register under the said act, and that to the best of my knowledge, information, and belief there is no unregistered estate or interest, contract or engagement for the registration whereof provision is made by the last-mentioned act subsisting or capable of taking effect in the said hereditaments, or any part thereof, and that I am entitled to be registered as the proprietor of the said hereditaments with an absolute title under 'The Land Transfer Act, 1875,' subject

(*h*) See General Rule 59.

(*i*) The Land Registry Act, 1862.

only to the entries now appearing from the register under the Act of 25 & 26 Vict. c. 53 (*k*).

"And I make, &c."

The applicant should, with the application and declaration, leave at the office an extract from the public map, pursuant to General Rule 3 (*l*).

Local Registries.

SECTION 127.

Land Registered under Act to be exempted from Registry of Deeds.

Any land situate within the jurisdiction of any of the following local registries; that is to say,

- (1.) The registry for the county of Middlesex;
or
- (2.) The registry for the West Riding of Yorkshire; or
- (3.) The registry for the North Riding of Yorkshire; or
- (4.) The registry for the East Riding of Yorkshire and the town and county of the town of Kingston-upon-Hull;

shall, if registered under this act, from and after the date of the registration thereof, be exempt from such jurisdiction; and no document relating to any such registered land executed and no testamentary instrument relating to any such registered land coming into operation subsequently to such date as last aforesaid shall be required to be registered in any of the said local registries.

The recent cases on these registries will be found collected in Dart's Vendors and Purchasers, chap. 15, sect. 4.

(*k*) Form 38.

(*l*) See Holt on Registration of Title, 164, 165, as to the advantages of re-registration.

Much interesting information respecting the Middlesex Registry will be found in the Report of the Land Transfer Commissioners, 1869, pp. XXXIII. to XXXVI., and the Minutes of Evidence taken before them, pp. 36 to 46. The Commissioners advised that, "from as early a date as possible the registry should be closed, as regards the registration of deeds executed after that date" (*m*).

See a list of the acts creating the registries mentioned in this section in the note to sect. 8 of the Vendor and Purchaser Act, *supra*. The present section is copied from sect. 104 of the Act of 1862.

The effect of the present section is salutary. There are not to be two concurrent registries of the same land, the one a registry of assurances, the other a registry of title.

See the next section as to compensation to officers of local registries for loss of fees through this section.

SECTION 128.

Compensation to Officers of Local Registries of Deeds.

If any person who is at the commencement of this act a registrar of or an officer in any of the said local registries, suffers any loss of fees or emoluments by reason of the business in such registry being diminished in consequence of this act, he may petition the Commissioners of Her Majesty's Treasury for compensation, and the Commissioners of Her Majesty's Treasury shall inquire whether any, and if any, what compensation ought to be made to the petitioner, regard being had to the conditions on which his appointment was made, the nature of his office, the duration of his service, the character of his fees or emoluments, and all

(*m*) Report of the Land Transfer Commission, 1869, p. 37.

the circumstances of the case. The petitioner shall render to the Commissioners of Her Majesty's Treasury such account of the fees and emoluments received by him during any period not exceeding five years before the passing of this act, and during such period before the date of his petition, and give such information as the Commissioners of Her Majesty's Treasury may require for the purpose of enabling them to ascertain whether the petitioner has suffered the loss alleged by him, and whether any, and if any, what compensation ought to be made to him.

If the Commissioners of Her Majesty's Treasury think that the claim of the petitioner to compensation is established, they may award to him, out of moneys to be provided by parliament, such compensation, by annuity or otherwise, as under the circumstances of the case they think just and reasonable.

See the preceding section. Unless registration of title be made compulsory, this section will not be likely to lead to the presentation of any petition.

SECTION 129.

Repeal of 37 & 38 Vict. c. 78, s. 7.

The seventh section of the Vendor and Purchaser Act, 1874, is hereby repealed, as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of this act.

See sect. 48, *supra*.

The 7th section of the Vendor and Purchaser Act, 1874, is not merely made, like the 5th section of that act, inapplicable to registered lands; it is absolutely repealed as to all lands, retrospectively, as from the 7th of August, 1874, the date on which

it received the Royal Assent. The repealed enactment did not originally form part of the Vendor and Purchaser Act, 1874: and its repeal cannot affect the remaining provisions of that useful statute. Its removal from the statute book will, on the other hand, be hailed with satisfaction by the profession, harassed by fruitless efforts to restrain the sweeping effect of its provisions, which, *totidem verbis*, abolished all "protection to any interest in land by reason of its being protected by (*sic*) any legal or other estate" (*n*). The saving clause, "except as to anything duly done thereunder before the commencement of this act," was not in the section as sent down from the House of Lords. With a view to protecting transactions which may have taken place, on the faith of the repealed enactment (*o*), between the 7th of August, 1874, and the 13th of August, 1875 (*p*), this saving clause was added in committee on the bill in the House of Commons by the writer.

(*n*) See the notes to sect. 7 of the Vendor and Purchaser Act, 1874, in the first edition of this work (1874).

(*o*) This is clearly the meaning of the expression, "thereunder;" "*duly* done thereunder" is equivalent to "in *bonâ fide* reliance on the said enactment."

(*p*) This is implied in the expression, "before the commencement of this act."

N.B. The expression, "except as to anything *duly* done," is mere "common form," as might be shown by referring to its constant use in the repealing clauses of acts of parliament. In last year's statutes (38 & 39 Vict.) it occurs in cap. 55, sect. 343 (a); cap. 79, sect. 2; cap. 86, sect. 17, III. (2); and cap. 94, sect. 2. On the other hand, "except as to anything *done*," occurs in cap. 14, sect. 2; cap. 25, sect. 18; cap. 60, sect. 5; cap. 77, sect. 33; that is to say, with equal frequency. It would therefore seem that the two expressions "done" and "duly done" are used by parliamentary draughtsmen *indifferently*, the one being as much common form as the other; and that an eminent legal periodical is hardly justified, it is submitted, in concluding, with reference to the expression used in the present section, that "the whole pinch of the construction seems to rest in the word '*duly*.'" *Solicitors' Journal*, Vol. XX., p. 169.

APPENDIX

TO

The Land Transfer Act, 1875.

DISTRIBUTION OF BUSINESS IN THE OFFICE OF LAND REGISTRY.

RULE UNDER SECTION 123.

BY virtue and in pursuance of "The Land Transfer Act, 1875," I, the Right Honorable HUGH MACCALMONT BARON CAIRNS, LORD HIGH CHANCELLOR OF GREAT BRITAIN, do distribute the business to be performed in the Office of Land Registry, as constituted under the Act, amongst the several officers attached thereto by the 123rd section of the Act, in manner following; that is to say, the Registrar shall perform the duties of Registrar under the Act; the Assistant Registrar shall, in the absence of the Registrar, perform the duties of Registrar under the Act, other than and except the duties hereinafter mentioned, and shall when the Registrar is present act in aid of the Registrar and subject to his directions. But the Registrar alone shall be entitled to perform the following acts, viz.,

- (a.) To approve of an absolute or qualified title in reference either to freehold or leasehold land :

- (b.) To inhibit dealings with registered land:
- (c.) To order production of deeds :
- (d.) To state a case for the opinion of the Court :
- (e.) To direct substituted service.

The other officers shall, under the direction of the Registrar, or in his absence of the Assistant Registrar, perform such duties in relation to the business under the Act as shall be the same as, or duties analogous to, those which they respectively performed previously to the passing of the Act.

Dated this 24th day of December, 1875.

CAIRNS, C.

GENERAL RULES

UNDER SECTION 111.*

By virtue and in pursuance of "The Land Transfer Act, 1875," I, the Right Honorable HUGH MACCALMONT BARON CAIRNS, LORD HIGH CHANCELLOR OF GREAT BRITAIN, with the advice and assistance of Brent Spencer Follett, Esquire, one of her Majesty's Counsel, the Registrar under the Act, do make the following General Rules for the purpose of carrying the Act into execution.

Dated this 24th day of December, 1875.

CAIRNS, C.

B. SPENCER FOLLETT.

PROCEEDINGS ON FIRST REGISTRATION.

GENERAL.

Application for Registration of Proprietorship.

1. Every application for registration shall state the nature of the interest of the applicant, and a general description in concise terms of the land, and shall refer to the particular description to be left therewith. It shall also state whether the registration applied for is with an absolute or a possessory title, or, in the case of leasehold

* "Any rules made in pursuance of this section shall be of the same force as if enacted in this Act, and shall be judicially noticed."

land, with or without a declaration of the title of the lessor to grant the lease under which the land is held.

Where the application is for the registration of a nominee, or is made by a purchaser, the consent in writing of the nominee or his solicitor, or the vendor or his solicitor, shall be left with the application; and where such application is made by virtue of a trust or power of sale, the consent in writing of the person, if any, whose consent is required to the exercise of such trust or power, shall be also left with the application.

Land below high-water mark.

2. Where land comprised in an application for registration is below high-water mark at ordinary spring tides, the fact shall be stated in the application, and the notices required by the 66th section of the act shall be prepared by the applicant and served through the office within seven days of the application being left.

Description.

3. A particular description of the land comprised in the application and, as part thereof, an extract on tracing linen from the public map, with a reference where necessary to a revision and enlargement of such extract, to be made also on tracing linen, delineating the land and defining its locality, shall be left with the application. This description shall be signed by the applicant or his solicitor, and the extract shall have a margin of at least two inches left for annexing to the register; and the public map from which the extract is taken, and the date and scale, if any, marked thereon shall be stated on the extract.

Production of Documents under the 71st section.

4. Where any person shall be required to produce deeds, instruments, or evidence of title under the 71st section, the requirement to produce the same shall be prepared by the applicant and settled by the registrar and served through the office.

Abatement of Proceedings.

5. In the case of death or transmission or change of interest pending registration, the proceedings therein shall not abate, but shall, subject to the provisions of the act and of these rules, be available to such person as the registrar on application, having regard to the rights of the

several persons interested in the land, may direct, if such person think proper to adopt the same.

POSSESSORY TITLE.

6. If the application for registration is with a possessory title only, there shall be left in the office with the application a declaration made by the applicant (or by one of the applicants if more than one, or by some person whose consent is required to the application) and his solicitor, to the best of their respective knowledge, information, and belief verifying the description, and to the effect that the applicant, either alone or with the person (if any) consenting to such application, and either subject or not to incumbrances, is well entitled for his or their own benefit, or as holding the land on trust for sale, or as trustee, mortgagee, or otherwise having a power of selling the land (as the case may be) to an estate in fee simple, or the power of disposing by way of sale of an estate in fee simple in the land, that the actual possession or receipt of the rents and profits thereof is in accordance with the applicant's title, and that the applicant or his nominee is entitled under the act to be registered as the proprietor of the land, and that the documents of title (if any) mentioned in the schedule to such declaration comprise amongst others (if the fact be so) the last conveyance or other document under which the applicant's title is derived, and (if the fact be so) that upon the documents so referred to being stamped or marked under the 72nd section, the registration cannot be concealed from a purchaser or other person dealing with the land.

The documents (if any) referred to in the declaration shall be left in the office with the application. If there be no such documents then the applicant shall leave in the office with the application such evidence as will satisfy the registrar that the registration cannot be concealed from a purchaser or other person dealing with the land. Such notice (if any) of the application for registration or of the registration shall be given as the registrar may direct.

When the registrar is satisfied with the declaration produced and with the description of the land, and the documents (if any) to be stamped or marked have been left for the purpose, or the registrar is otherwise satisfied that the registration cannot be concealed from a person dealing with the land, he shall register the applicant with a possessory title.

ABSOLUTE TITLE AND LEASEHOLD LAND.

Additions to and Verification of Description.

7. If the land be in the occupation of any persons other than yearly tenants, or tenants at will, or be subject to any leases, agreements for leases, or incumbrances, or be situate within or held of any manor, the particulars of the names and addresses of the tenants, lessees, incumbrancers, and lord of the manor shall be added to the description.

The description and such last-mentioned particulars (if any) shall be verified by the declaration of the applicant, (or of one of the applicants, if more than one, or of some person whose consent is required to the application,) and his solicitor; such declaration shall be left with the application, and shall state that the actual possession or receipt of the rents and profits of the land comprised in the application is in accordance with the applicant's title.

Abstracts and Proofs.

8. If the application is for registration with an absolute title, or of leasehold land with or without a declaration of the title of the lessor, an abstract of title shall be left with the application. The abstract shall be in the usual form, regard being had to the provisions of the "Vendor and Purchaser Act, 1874," and any opinion of counsel, or any requisitions and answers relating to the title that may be in the control of the applicant, shall also be left with the application. The documents to be produced in support of the abstract shall be left with the application, or a place and time appointed, on leaving the abstract, for the production of such documents.

All abstracts and copies of documents left in the office shall be examined and compared with the original muniments, and all searches and inquiries which the registrar shall consider necessary in the investigation of or in relation to title shall be made, by such person and in such manner as the registrar shall direct. A schedule of documents left in the office in support of the abstract shall be left with such documents.

Examination of Title.

9. The registrar may, if he so think fit, refer any title, the examination of which is required to be made by him, or any points arising thereon, to either of the present examiners of title under the Land Registry Act, 1862, or to one of the

conveyancing counsel of the Chancery Division of the High Court of Justice. The costs of such examination, and of proving the title, and of searches and enquiries in relation thereto, and the fees of any conveyancing counsel to whom any title, or points arising thereon, may be referred shall be paid by the applicant.

Advertisement and Notices of Application.

10. Before any person is registered as proprietor with an absolute or qualified title of any freehold land, or (if the registrar shall so think fit) of any leasehold land, notice of the application for registration shall be given by advertisement in such newspaper or newspapers as the registrar shall direct. The registration shall not be completed before the expiration of three months from the date of such advertisement (if any), or the first of such advertisements, if more than one, or one month from the date fixed by the registrar as the date of the settlement by him of the statement of title under the 12th Rule, whichever shall, in case there be an advertisement, last happen. Such advertisement may be issued at the request of the applicant at any time after the application for registration shall have been left in the office. A copy of the paper or papers containing the advertisement shall be left in the office.

Notice of the application shall be served by the applicant on such tenants and incumbrancers and other persons as the registrar shall direct, and, if the property is leasehold, on the lessor or grantor, or his representative, and if the property is situated within or held of any manor, on the lord of the manor, unless in any such case the registrar shall otherwise direct.

Objections.

11. At any time within three months of the issue of the first advertisement any person may, by notice in writing to be signed by him or his solicitor, and left in the office, object to the registration. Such notice shall contain an address in the United Kingdom on which service on the objector shall be made, and shall also contain a concise statement of the particulars of the objection.

Statement of Title.

12. When the title is approved by the registrar as an absolute or qualified title, or in the case of leasehold land is approved by the registrar with or without a declaration

of the lessor's title to grant the lease, the applicant shall furnish a statement of the following particulars, which the registrar shall settle for the purpose of framing therefrom, and from the description of the land, the entries for the register; that is to say,

1st. The name, address, and description of the proprietor to be entered on the register, and the nature of his proprietorship and title, and the qualifications (if any) of the title.

2ndly. The incumbrances, including leases and agreements for leases, if any, to be entered on the register.

3rdly. In the case of leasehold land, where a declaration of the title of the lessor to grant the lease is to be made, any entry required to be made in respect of such declaration; and also if the lease contains a prohibition against alienation without licence, the particulars of the provision to be entered on the register by way of restriction to that effect.

4thly. Any other entry authorized by the act to be made on the register, and the entry of which is required or ought to be made.

5thly. If the description of the land require alteration, the particulars of such alteration.

When such statement has been settled by the registrar notice thereof shall be given by the applicant to all persons, whether or not they shall have any interest noted therein, to whom, in the registrar's opinion, notice should be sent, and to any other person claiming any interest in the property who shall in writing have required the registrar to give him such notice and furnished an address in the United Kingdom for that purpose. The statement may be seen in the office by the applicant, and by any other person, whether or not notice has been given to him, who shall satisfy the registrar that he ought to be allowed to inspect the same, and a copy shall, if required, be furnished to the applicant at his expense. Any such person may object to such statement, and the objection to such statement shall be made in writing, signed by the objector or his solicitor, and left in the office before the expiration of the period referred to in Rule 10, and shall contain an address in the United Kingdom at which service on the objector shall be made, and shall contain a concise statement of the particulars of the objection.

Hearing of Objection.

13. The applicant or his solicitor shall obtain an appointment before the registrar for hearing any objection with reference to registration or to the statement of title under Rule 12, which shall have been duly left in the office, and shall serve the objector with a notice in writing to come in and state his objection to the registrar at the time mentioned in such notice, such time not being less than seven clear days after service of such notice. The parties may be heard in person, or by counsel or solicitor.

Proceedings may be modified in cases of Parliamentary Title.

14. In any case where the registration affects land already registered, or relates to land allotted or taken in exchange on an inclosure, or under an order of exchange of the Inclosure Commissioners for England and Wales, and enuring to the registered title, or otherwise acquired by the applicant under a parliamentary title, the registrar may, if he so think fit, modify or waive the notice directed by the 10th Rule to be given by advertisement, and may otherwise modify the proceedings, and may complete the registration as soon as he considers it can properly be done.

CAUTION AGAINST ENTRY OF LAND ON REGISTER.

15. Every caution lodged under the 60th section of the act shall be signed by the cautioner or his solicitor, and shall contain a place of address in the United Kingdom at which any notice may be served; and the description of the land to be contained in the declaration in support of the caution shall refer to an extract from the public map, with a revision and enlargement of such extract where necessary, delineating the land and defining its locality, and such declaration shall be left with the caution. The period to be limited by the notice to be served on the cautioner under the 62nd section shall be fourteen days, or such other period not less than seven days, as the registrar may direct.

The notice shall be served either personally or through the post. Every caution shall be renewed before the expiration of five years from the date of lodging the same, otherwise it shall be treated as withdrawn.

PROCEEDINGS AFTER REGISTRATION.

Caution against dealing with Registered Land.

16. Every caution lodged under the 53rd section of the act shall be signed by the cautioner or his solicitor, and shall contain a place of address in the United Kingdom at which any notice may be served, and the declaration in support of the caution shall contain a reference to the land or charge to which the caution applies, and to the registered number of the estate, and shall also contain the particulars of the cautioner's interest in such land or charge.

The period to be limited by the notice to be served on the cautioner under the 54th section of the act shall be fourteen days, or such other period, not less than seven days, as the registrar may direct. The consent of a cautioner under the 54th section shall be signed by him, and shall be attested by a solicitor and duly verified.

Inhibitions.

17. Every application to the registrar for an inhibiting order under the 57th section of the act shall be supported by the declaration of the applicant or his solicitor, stating the grounds of the application and referring to the evidence in favour thereof. An appointment shall be then made for hearing the same and for production of the evidence in support thereof.

Restrictions.

18. Every application under the 58th section of the act shall state the particulars of the direction or restriction required to be entered on the register, and shall be proceeded with as the registrar shall direct; and every application under the 59th section of the act to withdraw or modify any direction or restriction shall be made and signed by all persons for the time being appearing by the register to be interested in such direction or restriction, and shall be attested by a solicitor and duly verified.

19. Before any entry is made upon the register under the 3rd paragraph of the 83rd section of the act the consent in writing thereto of the persons to be entered as the registered proprietors of the land or charge, stating the particulars of the entry required, shall be lodged in the office.

Charge of Registered Land.

20. The instrument by which any charge of freehold or leasehold land shall be made under the 22nd section of the

act shall be left in the office, and the execution thereof by the registered proprietor of the land shall be attested by a solicitor and duly verified. And where it is desired that an entry should be made on the register negating the implied covenants referred to in the 23rd and 24th sections of the act, or that any entry should be made on the register, contrary to the powers given to a registered proprietor of a registered charge by the 25th, 26th, and 27th sections respectively, or contrary to the provisions of the 28th section as to the priority of registered charges, the application to be made in that behalf shall state the particulars of the entry required to be made, and shall be signed and the signature attested and verified in the same manner as is required with respect to the execution of the instrument of charge. Such verification may, where practicable, be made by the same declaration as that verifying the execution of the instrument of charge. Where a part only of the registered land is comprised in the instrument of charge, the part so charged shall be described in like manner as is provided by Rule 23 with reference to a transfer of part of registered land; and in the event of a foreclosure or sale being enforced by the registered proprietor of the charge all the provisions of the said rule shall, so far as the nature of the case may require, be applicable thereto.

Transfer of Charge.

21. The instrument by which any transfer of charge shall be made under the 40th section of the act shall be left in the office, and the execution thereof by the registered proprietor of the charge shall be attested by a solicitor and duly verified.

Cessation of Charge.

22. Where the cessation of a charge entered on the register is required to be notified under the 28th section of the act, the application shall be signed by the registered proprietor of the charge, or a registered proprietor interested in the land, and shall be attested by a solicitor and duly verified. If the application is not signed by the registered proprietor of the charge, due proof shall be left with the application of the satisfaction of the charge. The registrar, upon being satisfied of the cessation of a charge shall, where convenient, notify the same by cancelling the original entry, or shall otherwise enter on the register the fact of such cessation.

Transfer of Land.

23. The instrument by which any transfer of land shall be made under the 29th or 34th sections of the act shall be left in the office, and the execution thereof by the registered proprietor shall be attested by a solicitor and duly verified. The land shall be described by reference to the registered description, and where a part only of the registered land is comprised in the transfer an extract or copy on tracing linen of or from the public map referred to in such registered description, with a reference where necessary to a revision and enlargement of such extract, to be made on tracing linen, delineating the land transferred and defining its locality, with reference to the land retained, shall be referred to in the instrument of transfer, and annexed thereto, and shall be referred to in and form part of the registered description of the part transferred. The provision of Rule 3, as to the extract there referred to, shall apply to the extract required by this rule, and unless such last-mentioned extract shall be conveniently removable for annexation to the register a duplicate thereof shall be left for the purpose. A note shall be made on the registered description of the land retained, referring to the part disposed of. The registrar may, if he so think fit, require that the extract from the public map, referred to in the instrument of transfer of part of registered land, be verified by declaration, or otherwise, as he may direct.

Entry negating implied Covenants on Transfer of Leasehold Land.

24. Every application requiring an entry to be made on the register negating the implied covenants referred to in the 39th section of the act, shall state the particulars of the entry required to be made, and shall be signed, attested, and verified in the same manner as is required with respect to the execution of the instrument of transfer. Such verification may where practicable be made by the same declaration as that verifying the instrument of transfer.

Evidence of Transmission of Registered Proprietorship.

25. Where it is required to prove the fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, the application shall state the fact to be proved, and the nature of the evidence in support thereof. The evidence shall be

left in the office with the application, and the fact shall be proved to the satisfaction of the registrar, and the matter shall be proceeded with as he shall direct.

*Death or Marriage of Registered Proprietor, and
Dower or Curtesy.*

26. Every application under the 41st, 44th, 45th, or 52nd section of the act shall be supported by the declaration of the applicant and his solicitor, showing concisely the existing rights of the several persons interested in the land or charge affected by the application. The evidence in support of the application shall be left therewith in the office, and the registrar may require such other evidence, if any, and such notices to be given as he may think fit, and the matter shall be proceeded with as he shall direct. Notice of the title to an estate in dower or by the curtesy shall be entered on the register as an incumbrance.

*Cessation of Incumbrances entered on First Registration,
and Determination of Lease of Registered Leasehold
Land.*

27. Where upon the first registration of any freehold or leasehold land notice of an incumbrance affecting such land has been entered on the register, the cessation of which is required to be notified under the 19th section of the act, the applicant shall in case there has been any dealing with, or transmission of, or interest created or arisen in such incumbrance not appearing on the register, leave in the office an abstract of his title to make the application, and prove the same in the usual way, and the matter shall be proceeded with in the mode provided in the cases of examination of title on registration, subject to any special directions of the registrar. Where there has been no dealing with the incumbrance the applicant shall produce the instrument of incumbrance with a release or receipt thereon signed by the incumbrancer, whose signature and identity shall be duly verified. The registrar, upon being satisfied of the cessation of an incumbrance, shall notify the same by cancelling, where convenient, the original entry, or otherwise by entering on the register the fact of such cessation. This rule shall, where applicable, extend to applications to notify the determination of any lease of registered leasehold land under the 20th section of the act.

ABSOLUTE TITLE AND LEASEHOLD LAND.

Additions to and Verification of Description.

7. If the land be in the occupation of any persons other than yearly tenants, or tenants at will, or be subject to any leases, agreements for leases, or incumbrances, or be situate within or held of any manor, the particulars of the names and addresses of the tenants, lessees, incumbrancers, and lord of the manor shall be added to the description.

The description and such last-mentioned particulars (if any) shall be verified by the declaration of the applicant, (or of one of the applicants, if more than one, or of some person whose consent is required to the application,) and his solicitor; such declaration shall be left with the application, and shall state that the actual possession or receipt of the rents and profits of the land comprised in the application is in accordance with the applicant's title.

Abstracts and Proofs.

8. If the application is for registration with an absolute title, or of leasehold land with or without a declaration of the title of the lessor, an abstract of title shall be left with the application. The abstract shall be in the usual form, regard being had to the provisions of the "Vendor and Purchaser Act, 1874," and any opinion of counsel, or any requisitions and answers relating to the title that may be in the control of the applicant, shall also be left with the application. The documents to be produced in support of the abstract shall be left with the application, or a place and time appointed, on leaving the abstract, for the production of such documents.

All abstracts and copies of documents left in the office shall be examined and compared with the original muniments, and all searches and inquiries which the registrar shall consider necessary in the investigation of or in relation to title shall be made, by such person and in such manner as the registrar shall direct. A schedule of documents left in the office in support of the abstract shall be left with such documents.

Examination of Title.

9. The registrar may, if he so think fit, refer any title, the examination of which is required to be made by him, or any points arising thereon, to either of the present examiners of title under the Land Registry Act, 1862, or to one of the

conveyancing counsel of the Chancery Division of the High Court of Justice. The costs of such examination, and of proving the title, and of searches and enquiries in relation thereto, and the fees of any conveyancing counsel to whom any title, or points arising thereon, may be referred shall be paid by the applicant.

Advertisement and Notices of Application.

10. Before any person is registered as proprietor with an absolute or qualified title of any freehold land, or (if the registrar shall so think fit) of any leasehold land, notice of the application for registration shall be given by advertisement in such newspaper or newspapers as the registrar shall direct. The registration shall not be completed before the expiration of three months from the date of such advertisement (if any), or the first of such advertisements, if more than one, or one month from the date fixed by the registrar as the date of the settlement by him of the statement of title under the 12th Rule, whichever shall, in case there be an advertisement, last happen. Such advertisement may be issued at the request of the applicant at any time after the application for registration shall have been left in the office. A copy of the paper or papers containing the advertisement shall be left in the office.

Notice of the application shall be served by the applicant on such tenants and incumbrancers and other persons as the registrar shall direct, and, if the property is leasehold, on the lessor or grantor, or his representative, and if the property is situated within or held of any manor, on the lord of the manor, unless in any such case the registrar shall otherwise direct.

Objections.

11. At any time within three months of the issue of the first advertisement any person may, by notice in writing to be signed by him or his solicitor, and left in the office, object to the registration. Such notice shall contain an address in the United Kingdom on which service on the objector shall be made, and shall also contain a concise statement of the particulars of the objection.

Statement of Title.

12. When the title is approved by the registrar as an absolute or qualified title, or in the case of leasehold land is approved by the registrar with or without a declaration

of the lessor's title to grant the lease, the applicant shall furnish a statement of the following particulars, which the registrar shall settle for the purpose of framing therefrom, and from the description of the land, the entries for the register; that is to say,

- 1st. The name, address, and description of the proprietor to be entered on the register, and the nature of his proprietorship and title, and the qualifications (if any) of the title.
- 2ndly. The incumbrances, including leases and agreements for leases, if any, to be entered on the register.
- 3rdly. In the case of leasehold land, where a declaration of the title of the lessor to grant the lease is to be made, any entry required to be made in respect of such declaration; and also if the lease contains a prohibition against alienation without licence, the particulars of the provision to be entered on the register by way of restriction to that effect.
- 4thly. Any other entry authorized by the act to be made on the register, and the entry of which is required or ought to be made.
- 5thly. If the description of the land require alteration, the particulars of such alteration.

When such statement has been settled by the registrar notice thereof shall be given by the applicant to all persons, whether or not they shall have any interest noted therein, to whom, in the registrar's opinion, notice should be sent, and to any other person claiming any interest in the property who shall in writing have required the registrar to give him such notice and furnished an address in the United Kingdom for that purpose. The statement may be seen in the office by the applicant, and by any other person, whether or not notice has been given to him, who shall satisfy the registrar that he ought to be allowed to inspect the same, and a copy shall, if required, be furnished to the applicant at his expense. Any such person may object to such statement, and the objection to such statement shall be made in writing, signed by the objector or his solicitor, and left in the office before the expiration of the period referred to in Rule 10, and shall contain an address in the United Kingdom at which service on the objector shall be made, and shall contain a concise statement of the particulars of the objection.

Hearing of Objection.

13. The applicant or his solicitor shall obtain an appointment before the registrar for hearing any objection with reference to registration or to the statement of title under Rule 12, which shall have been duly left in the office, and shall serve the objector with a notice in writing to come in and state his objection to the registrar at the time mentioned in such notice, such time not being less than seven clear days after service of such notice. The parties may be heard in person, or by counsel or solicitor.

Proceedings may be modified in cases of Parliamentary Title.

14. In any case where the registration affects land already registered, or relates to land allotted or taken in exchange on an inclosure, or under an order of exchange of the Inclosure Commissioners for England and Wales, and enuring to the registered title, or otherwise acquired by the applicant under a parliamentary title, the registrar may, if he so think fit, modify or waive the notice directed by the 10th Rule to be given by advertisement, and may otherwise modify the proceedings, and may complete the registration as soon as he considers it can properly be done.

CAUTION AGAINST ENTRY OF LAND ON REGISTER.

15. Every caution lodged under the 60th section of the act shall be signed by the cautioner or his solicitor, and shall contain a place of address in the United Kingdom at which any notice may be served; and the description of the land to be contained in the declaration in support of the caution shall refer to an extract from the public map, with a revision and enlargement of such extract where necessary, delineating the land and defining its locality, and such declaration shall be left with the caution. The period to be limited by the notice to be served on the cautioner under the 62nd section shall be fourteen days, or such other period not less than seven days, as the registrar may direct.

The notice shall be served either personally or through the post. Every caution shall be renewed before the expiration of five years from the date of lodging the same, otherwise it shall be treated as withdrawn.

PROCEEDINGS AFTER REGISTRATION.

Caution against dealing with Registered Land.

16. Every caution lodged under the 53rd section of the act shall be signed by the cautioner or his solicitor, and shall contain a place of address in the United Kingdom at which any notice may be served, and the declaration in support of the caution shall contain a reference to the land or charge to which the caution applies, and to the registered number of the estate, and shall also contain the particulars of the cautioner's interest in such land or charge.

The period to be limited by the notice to be served on the cautioner under the 54th section of the act shall be fourteen days, or such other period, not less than seven days, as the registrar may direct. The consent of a cautioner under the 54th section shall be signed by him, and shall be attested by a solicitor and duly verified.

Inhibitions.

17. Every application to the registrar for an inhibiting order under the 57th section of the act shall be supported by the declaration of the applicant or his solicitor, stating the grounds of the application and referring to the evidence in favour thereof. An appointment shall be then made for hearing the same and for production of the evidence in support thereof.

Restrictions.

18. Every application under the 58th section of the act shall state the particulars of the direction or restriction required to be entered on the register, and shall be proceeded with as the registrar shall direct; and every application under the 59th section of the act to withdraw or modify any direction or restriction shall be made and signed by all persons for the time being appearing by the register to be interested in such direction or restriction, and shall be attested by a solicitor and duly verified.

19. Before any entry is made upon the register under the 3rd paragraph of the 83rd section of the act the consent in writing thereto of the persons to be entered as the registered proprietors of the land or charge, stating the particulars of the entry required, shall be lodged in the office.

Charge of Registered Land.

20. The instrument by which any charge of freehold or leasehold land shall be made under the 22nd section of the

act shall be left in the office, and the execution thereof by the registered proprietor of the land shall be attested by a solicitor and duly verified. And where it is desired that an entry should be made on the register negating the implied covenants referred to in the 23rd and 24th sections of the act, or that any entry should be made on the register, contrary to the powers given to a registered proprietor of a registered charge by the 25th, 26th, and 27th sections respectively, or contrary to the provisions of the 28th section as to the priority of registered charges, the application to be made in that behalf shall state the particulars of the entry required to be made, and shall be signed and the signature attested and verified in the same manner as is required with respect to the execution of the instrument of charge. Such verification may, where practicable, be made by the same declaration as that verifying the execution of the instrument of charge. Where a part only of the registered land is comprised in the instrument of charge, the part so charged shall be described in like manner as is provided by Rule 23 with reference to a transfer of part of registered land; and in the event of a foreclosure or sale being enforced by the registered proprietor of the charge all the provisions of the said rule shall, so far as the nature of the case may require, be applicable thereto.

Transfer of Charge.

21. The instrument by which any transfer of charge shall be made under the 40th section of the act shall be left in the office, and the execution thereof by the registered proprietor of the charge shall be attested by a solicitor and duly verified.

Cessation of Charge.

22. Where the cessation of a charge entered on the register is required to be notified under the 28th section of the act, the application shall be signed by the registered proprietor of the charge, or a registered proprietor interested in the land, and shall be attested by a solicitor and duly verified. If the application is not signed by the registered proprietor of the charge, due proof shall be left with the application of the satisfaction of the charge. The registrar, upon being satisfied of the cessation of a charge shall, where convenient, notify the same by cancelling the original entry, or shall otherwise enter on the register the fact of such cessation.

Transfer of Land.

23. The instrument by which any transfer of land shall be made under the 29th or 34th sections of the act shall be left in the office, and the execution thereof by the registered proprietor shall be attested by a solicitor and duly verified. The land shall be described by reference to the registered description, and where a part only of the registered land is comprised in the transfer an extract or copy on tracing linen of or from the public map referred to in such registered description, with a reference where necessary to a revision and enlargement of such extract, to be made on tracing linen, delineating the land transferred and defining its locality, with reference to the land retained, shall be referred to in the instrument of transfer, and annexed thereto, and shall be referred to in and form part of the registered description of the part transferred. The provision of Rule 3, as to the extract there referred to, shall apply to the extract required by this rule, and unless such last-mentioned extract shall be conveniently removable for annexation to the register a duplicate thereof shall be left for the purpose. A note shall be made on the registered description of the land retained, referring to the part disposed of. The registrar may, if he so think fit, require that the extract from the public map, referred to in the instrument of transfer of part of registered land, be verified by declaration, or otherwise, as he may direct.

Entry negating implied Covenants on Transfer of Leasehold Land.

24. Every application requiring an entry to be made on the register negating the implied covenants referred to in the 39th section of the act, shall state the particulars of the entry required to be made, and shall be signed, attested, and verified in the same manner as is required with respect to the execution of the instrument of transfer. Such verification may where practicable be made by the same declaration as that verifying the instrument of transfer.

Evidence of Transmission of Registered Proprietorship.

25. Where it is required to prove the fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, the application shall state the fact to be proved, and the nature of the evidence in support thereof. The evidence shall be

left in the office with the application, and the fact shall be proved to the satisfaction of the registrar, and the matter shall be proceeded with as he shall direct.

*Death or Marriage of Registered Proprietor, and
Dower or Curtesy.*

26. Every application under the 41st, 44th, 45th, or 52nd section of the act shall be supported by the declaration of the applicant and his solicitor, showing concisely the existing rights of the several persons interested in the land or charge affected by the application. The evidence in support of the application shall be left therewith in the office, and the registrar may require such other evidence, if any, and such notices to be given as he may think fit, and the matter shall be proceeded with as he shall direct. Notice of the title to an estate in dower or by the curtesy shall be entered on the register as an incumbrance.

*Cessation of Incumbrances entered on First Registration,
and Determination of Lease of Registered Leasehold
Land.*

27. Where upon the first registration of any freehold or leasehold land notice of an incumbrance affecting such land has been entered on the register, the cessation of which is required to be notified under the 19th section of the act, the applicant shall in case there has been any dealing with, or transmission of, or interest created or arisen in such incumbrance not appearing on the register, leave in the office an abstract of his title to make the application, and prove the same in the usual way, and the matter shall be proceeded with in the mode provided in the cases of examination of title on registration, subject to any special directions of the registrar. Where there has been no dealing with the incumbrance the applicant shall produce the instrument of incumbrance with a release or receipt thereon signed by the incumbrancer, whose signature and identity shall be duly verified. The registrar, upon being satisfied of the cessation of an incumbrance, shall notify the same by cancelling, where convenient, the original entry, or otherwise by entering on the register the fact of such cessation. This rule shall, where applicable, extend to applications to notify the determination of any lease of registered leasehold land under the 20th section of the act.

land, with or without a declaration of the title of the lessor to grant the lease under which the land is held.

Where the application is for the registration of a nominee, or is made by a purchaser, the consent in writing of the nominee or his solicitor, or the vendor or his solicitor, shall be left with the application; and where such application is made by virtue of a trust or power of sale, the consent in writing of the person, if any, whose consent is required to the exercise of such trust or power, shall be also left with the application.

Land below high-water mark.

2. Where land comprised in an application for registration is below high-water mark at ordinary spring tides, the fact shall be stated in the application, and the notices required by the 66th section of the act shall be prepared by the applicant and served through the office within seven days of the application being left.

Description.

3. A particular description of the land comprised in the application and, as part thereof, an extract on tracing linen from the public map, with a reference where necessary to a revision and enlargement of such extract, to be made also on tracing linen, delineating the land and defining its locality, shall be left with the application. This description shall be signed by the applicant or his solicitor, and the extract shall have a margin of at least two inches left for annexing to the register; and the public map from which the extract is taken, and the date and scale, if any, marked thereon shall be stated on the extract.

Production of Documents under the 71st section.

4. Where any person shall be required to produce deeds, instruments, or evidence of title under the 71st section, the requirement to produce the same shall be prepared by the applicant and settled by the registrar and served through the office.

Abatement of Proceedings.

5. In the case of death or transmission or change of interest pending registration, the proceedings therein shall not abate, but shall, subject to the provisions of the act and of these rules, be available to such person as the registrar on application, having regard to the rights of the

several persons interested in the land, may direct, if such person think proper to adopt the same.

POSSESSORY TITLE.

6. If the application for registration is with a possessory title only, there shall be left in the office with the application a declaration made by the applicant (or by one of the applicants if more than one, or by some person whose consent is required to the application) and his solicitor, to the best of their respective knowledge, information, and belief verifying the description, and to the effect that the applicant, either alone or with the person (if any) consenting to such application, and either subject or not to incumbrances, is well entitled for his or their own benefit, or as holding the land on trust for sale, or as trustee, mortgagee, or otherwise having a power of selling the land (as the case may be) to an estate in fee simple, or the power of disposing by way of sale of an estate in fee simple in the land, that the actual possession or receipt of the rents and profits thereof is in accordance with the applicant's title, and that the applicant or his nominee is entitled under the act to be registered as the proprietor of the land, and that the documents of title (if any) mentioned in the schedule to such declaration comprise amongst others (if the fact be so) the last conveyance or other document under which the applicant's title is derived, and (if the fact be so) that upon the documents so referred to being stamped or marked under the 72nd section, the registration cannot be concealed from a purchaser or other person dealing with the land.

The documents (if any) referred to in the declaration shall be left in the office with the application. If there be no such documents then the applicant shall leave in the office with the application such evidence as will satisfy the registrar that the registration cannot be concealed from a purchaser or other person dealing with the land. Such notice (if any) of the application for registration or of the registration shall be given as the registrar may direct.

When the registrar is satisfied with the declaration produced and with the description of the land, and the documents (if any) to be stamped or marked have been left for the purpose, or the registrar is otherwise satisfied that the registration cannot be concealed from a person dealing with the land, he shall register the applicant with a possessory title.

ABSOLUTE TITLE AND LEASEHOLD LAND.

Additions to and Verification of Description.

7. If the land be in the occupation of any persons other than yearly tenants, or tenants at will, or be subject to any leases, agreements for leases, or incumbrances, or be situate within or held of any manor, the particulars of the names and addresses of the tenants, lessees, incumbrancers, and lord of the manor shall be added to the description.

The description and such last-mentioned particulars (if any) shall be verified by the declaration of the applicant, (or of one of the applicants, if more than one, or of some person whose consent is required to the application,) and his solicitor; such declaration shall be left with the application, and shall state that the actual possession or receipt of the rents and profits of the land comprised in the application is in accordance with the applicant's title.

Abstracts and Proofs.

8. If the application is for registration with an absolute title, or of leasehold land with or without a declaration of the title of the lessor, an abstract of title shall be left with the application. The abstract shall be in the usual form, regard being had to the provisions of the "Vendor and Purchaser Act, 1874," and any opinion of counsel, or any requisitions and answers relating to the title that may be in the control of the applicant, shall also be left with the application. The documents to be produced in support of the abstract shall be left with the application, or a place and time appointed, on leaving the abstract, for the production of such documents.

All abstracts and copies of documents left in the office shall be examined and compared with the original muniments, and all searches and inquiries which the registrar shall consider necessary in the investigation of or in relation to title shall be made, by such person and in such manner as the registrar shall direct. A schedule of documents left in the office in support of the abstract shall be left with such documents.

Examination of Title.

9. The registrar may, if he so think fit, refer any title, the examination of which is required to be made by him, or any points arising thereon, to either of the present examiners of title under the Land Registry Act, 1862, or to one of the

conveyancing counsel of the Chancery Division of the High Court of Justice. The costs of such examination, and of proving the title, and of searches and enquiries in relation thereto, and the fees of any conveyancing counsel to whom any title, or points arising thereon, may be referred shall be paid by the applicant.

Advertisement and Notices of Application.

10. Before any person is registered as proprietor with an absolute or qualified title of any freehold land, or (if the registrar shall so think fit) of any leasehold land, notice of the application for registration shall be given by advertisement in such newspaper or newspapers as the registrar shall direct. The registration shall not be completed before the expiration of three months from the date of such advertisement (if any), or the first of such advertisements, if more than one, or one month from the date fixed by the registrar as the date of the settlement by him of the statement of title under the 12th Rule, whichever shall, in case there be an advertisement, last happen. Such advertisement may be issued at the request of the applicant at any time after the application for registration shall have been left in the office. A copy of the paper or papers containing the advertisement shall be left in the office.

Notice of the application shall be served by the applicant on such tenants and incumbrancers and other persons as the registrar shall direct, and, if the property is leasehold, on the lessor or grantor, or his representative, and if the property is situated within or held of any manor, on the lord of the manor, unless in any such case the registrar shall otherwise direct.

Objections.

11. At any time within three months of the issue of the first advertisement any person may, by notice in writing to be signed by him or his solicitor, and left in the office, object to the registration. Such notice shall contain an address in the United Kingdom on which service on the objector shall be made, and shall also contain a concise statement of the particulars of the objection.

Statement of Title.

12. When the title is approved by the registrar as an absolute or qualified title, or in the case of leasehold land is approved by the registrar with or without a declaration

of the lessor's title to grant the lease, the applicant shall furnish a statement of the following particulars, which the registrar shall settle for the purpose of framing therefrom, and from the description of the land, the entries for the register; that is to say,

- 1st. The name, address, and description of the proprietor to be entered on the register, and the nature of his proprietorship and title, and the qualifications (if any) of the title.
- 2ndly. The incumbrances, including leases and agreements for leases, if any, to be entered on the register.
- 3rdly. In the case of leasehold land, where a declaration of the title of the lessor to grant the lease is to be made, any entry required to be made in respect of such declaration; and also if the lease contains a prohibition against alienation without licence, the particulars of the provision to be entered on the register by way of restriction to that effect.
- 4thly. Any other entry authorized by the act to be made on the register, and the entry of which is required or ought to be made.
- 5thly. If the description of the land require alteration, the particulars of such alteration.

When such statement has been settled by the registrar notice thereof shall be given by the applicant to all persons, whether or not they shall have any interest noted therein, to whom, in the registrar's opinion, notice should be sent, and to any other person claiming any interest in the property who shall in writing have required the registrar to give him such notice and furnished an address in the United Kingdom for that purpose. The statement may be seen in the office by the applicant, and by any other person, whether or not notice has been given to him, who shall satisfy the registrar that he ought to be allowed to inspect the same, and a copy shall, if required, be furnished to the applicant at his expense. Any such person may object to such statement, and the objection to such statement shall be made in writing, signed by the objector or his solicitor, and left in the office before the expiration of the period referred to in Rule 10, and shall contain an address in the United Kingdom at which service on the objector shall be made, and shall contain a concise statement of the particulars of the objection.

Hearing of Objection.

13. The applicant or his solicitor shall obtain an appointment before the registrar for hearing any objection with reference to registration or to the statement of title under Rule 12, which shall have been duly left in the office, and shall serve the objector with a notice in writing to come in and state his objection to the registrar at the time mentioned in such notice, such time not being less than seven clear days after service of such notice. The parties may be heard in person, or by counsel or solicitor.

Proceedings may be modified in cases of Parliamentary Title.

14. In any case where the registration affects land already registered, or relates to land allotted or taken in exchange on an inclosure, or under an order of exchange of the Inclosure Commissioners for England and Wales, and enuring to the registered title, or otherwise acquired by the applicant under a parliamentary title, the registrar may, if he so think fit, modify or waive the notice directed by the 10th Rule to be given by advertisement, and may otherwise modify the proceedings, and may complete the registration as soon as he considers it can properly be done.

CAUTION AGAINST ENTRY OF LAND ON REGISTER.

15. Every caution lodged under the 60th section of the act shall be signed by the cautioner or his solicitor, and shall contain a place of address in the United Kingdom at which any notice may be served; and the description of the land to be contained in the declaration in support of the caution shall refer to an extract from the public map, with a revision and enlargement of such extract where necessary, delineating the land and defining its locality, and such declaration shall be left with the caution. The period to be limited by the notice to be served on the cautioner under the 62nd section shall be fourteen days, or such other period not less than seven days, as the registrar may direct.

The notice shall be served either personally or through the post. Every caution shall be renewed before the expiration of five years from the date of lodging the same, otherwise it shall be treated as withdrawn.

PROCEEDINGS AFTER REGISTRATION.

Caution against dealing with Registered Land.

16. Every caution lodged under the 53rd section of the act shall be signed by the cautioner or his solicitor, and shall contain a place of address in the United Kingdom at which any notice may be served, and the declaration in support of the caution shall contain a reference to the land or charge to which the caution applies, and to the registered number of the estate, and shall also contain the particulars of the cautioner's interest in such land or charge.

The period to be limited by the notice to be served on the cautioner under the 54th section of the act shall be fourteen days, or such other period, not less than seven days, as the registrar may direct. The consent of a cautioner under the 54th section shall be signed by him, and shall be attested by a solicitor and duly verified.

Inhibitions.

17. Every application to the registrar for an inhibiting order under the 57th section of the act shall be supported by the declaration of the applicant or his solicitor, stating the grounds of the application and referring to the evidence in favour thereof. An appointment shall be then made for hearing the same and for production of the evidence in support thereof.

Restrictions.

18. Every application under the 58th section of the act shall state the particulars of the direction or restriction required to be entered on the register, and shall be proceeded with as the registrar shall direct; and every application under the 59th section of the act to withdraw or modify any direction or restriction shall be made and signed by all persons for the time being appearing by the register to be interested in such direction or restriction, and shall be attested by a solicitor and duly verified.

19. Before any entry is made upon the register under the 3rd paragraph of the 83rd section of the act the consent in writing thereto of the persons to be entered as the registered proprietors of the land or charge, stating the particulars of the entry required, shall be lodged in the office.

Charge of Registered Land.

20. The instrument by which any charge of freehold or leasehold land shall be made under the 22nd section of the

act shall be left in the office, and the execution thereof by the registered proprietor of the land shall be attested by a solicitor and duly verified. And where it is desired that an entry should be made on the register negating the implied covenants referred to in the 23rd and 24th sections of the act, or that any entry should be made on the register, contrary to the powers given to a registered proprietor of a registered charge by the 25th, 26th, and 27th sections respectively, or contrary to the provisions of the 28th section as to the priority of registered charges, the application to be made in that behalf shall state the particulars of the entry required to be made, and shall be signed and the signature attested and verified in the same manner as is required with respect to the execution of the instrument of charge. Such verification may, where practicable, be made by the same declaration as that verifying the execution of the instrument of charge. Where a part only of the registered land is comprised in the instrument of charge, the part so charged shall be described in like manner as is provided by Rule 23 with reference to a transfer of part of registered land; and in the event of a foreclosure or sale being enforced by the registered proprietor of the charge all the provisions of the said rule shall, so far as the nature of the case may require, be applicable thereto.

Transfer of Charge.

21. The instrument by which any transfer of charge shall be made under the 40th section of the act shall be left in the office, and the execution thereof by the registered proprietor of the charge shall be attested by a solicitor and duly verified.

Cessation of Charge.

22. Where the cessation of a charge entered on the register is required to be notified under the 28th section of the act, the application shall be signed by the registered proprietor of the charge, or a registered proprietor interested in the land, and shall be attested by a solicitor and duly verified. If the application is not signed by the registered proprietor of the charge, due proof shall be left with the application of the satisfaction of the charge. The registrar, upon being satisfied of the cessation of a charge shall, where convenient, notify the same by cancelling the original entry, or shall otherwise enter on the register the fact of such cessation.

Transfer of Land.

23. The instrument by which any transfer of land shall be made under the 29th or 34th sections of the act shall be left in the office, and the execution thereof by the registered proprietor shall be attested by a solicitor and duly verified. The land shall be described by reference to the registered description, and where a part only of the registered land is comprised in the transfer an extract or copy on tracing linen of or from the public map referred to in such registered description, with a reference where necessary to a revision and enlargement of such extract, to be made on tracing linen, delineating the land transferred and defining its locality, with reference to the land retained, shall be referred to in the instrument of transfer, and annexed thereto, and shall be referred to in and form part of the registered description of the part transferred. The provision of Rule 3, as to the extract there referred to, shall apply to the extract required by this rule, and unless such last-mentioned extract shall be conveniently removable for annexation to the register a duplicate thereof shall be left for the purpose. A note shall be made on the registered description of the land retained, referring to the part disposed of. The registrar may, if he so think fit, require that the extract from the public map, referred to in the instrument of transfer of part of registered land, be verified by declaration, or otherwise, as he may direct.

Entry negating implied Covenants on Transfer of Leasehold Land.

24. Every application requiring an entry to be made on the register negating the implied covenants referred to in the 39th section of the act, shall state the particulars of the entry required to be made, and shall be signed, attested, and verified in the same manner as is required with respect to the execution of the instrument of transfer. Such verification may where practicable be made by the same declaration as that verifying the instrument of transfer.

Evidence of Transmission of Registered Proprietorship.

25. Where it is required to prove the fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, the application shall state the fact to be proved, and the nature of the evidence in support thereof. The evidence shall be

left in the office with the application, and the fact shall be proved to the satisfaction of the registrar, and the matter shall be proceeded with as he shall direct.

*Death or Marriage of Registered Proprietor, and
Dower or Curtesy.*

26. Every application under the 41st, 44th, 45th, or 52nd section of the act shall be supported by the declaration of the applicant and his solicitor, showing concisely the existing rights of the several persons interested in the land or charge affected by the application. The evidence in support of the application shall be left therewith in the office, and the registrar may require such other evidence, if any, and such notices to be given as he may think fit, and the matter shall be proceeded with as he shall direct. Notice of the title to an estate in dower or by the curtesy shall be entered on the register as an incumbrance.

*Cessation of Incumbrances entered on First Registration,
and Determination of Lease of Registered Leasehold
Land.*

27. Where upon the first registration of any freehold or leasehold land notice of an incumbrance affecting such land has been entered on the register, the cessation of which is required to be notified under the 19th section of the act, the applicant shall in case there has been any dealing with, or transmission of, or interest created or arisen in such incumbrance not appearing on the register, leave in the office an abstract of his title to make the application, and prove the same in the usual way, and the matter shall be proceeded with in the mode provided in the cases of examination of title on registration, subject to any special directions of the registrar. Where there has been no dealing with the incumbrance the applicant shall produce the instrument of incumbrance with a release or receipt thereon signed by the incumbrancer, whose signature and identity shall be duly verified. The registrar, upon being satisfied of the cessation of an incumbrance, shall notify the same by cancelling, where convenient, the original entry, or otherwise by entering on the register the fact of such cessation. This rule shall, where applicable, extend to applications to notify the determination of any lease of registered leasehold land under the 20th section of the act.

Notice of Lease or Agreement.

28. Every application to register notice of a lease or agreement under the 50th and 51st sections of the act shall contain a concise statement of the terms of the lease or agreement for a lease to be noticed. If the registered proprietor of the land does not concur, and a copy only of the original lease or agreement is deposited with the registrar with the order of the court authorizing the registration of the notice, the lease or agreement shall be produced for comparison with the copy. If the registered proprietor concurs, he shall be a party to and sign the application, and his signature shall be attested by a solicitor and duly verified, and the application shall state the terms of the notice proposed to be entered, but such terms shall be subject to the approval of the registrar.

The lease or agreement shall be left with the application, and shall be stamped to show that a notice of it has been entered upon the register.

PROCEEDINGS ON AND AFTER REGISTRATION.

Entry as to Exceptions under 18th Section.

29. Every application requiring an entry to be made on the register in respect to any of the liabilities, rights, and interests that are by the act declared not to be incumbrances, shall state the particulars of the entry required to be made. The evidence in support of the application shall be left therewith, and subject to the provisions of the 18th section of the act as to succession duty, the application shall be proceeded with in such manner as the registrar shall direct.

The like, and as to Mines and Minerals unsevered from the Land.

30. Any fact not relating to succession duty to be notified on the register under sect. 18 of the act shall be entered in or against the registered description of the land, unless the registrar otherwise direct, and any fact relating to succession duty shall be notified on the register in such manner as the registrar shall think fit. And the entry in the registered description to the effect that the mines and minerals are included in the registration, shall be the registration of the registered proprietor of the land as proprietor also of the mines and minerals, and the mines and minerals shall thenceforth be considered as forming part

of and subject to the registered title of the land, unless otherwise noted on the register.

Conditions.

31. Every application to register conditions as annexed to land about to be registered, or to any registered land about to be transferred, shall be made in case of land about to be registered either by the person who by himself or nominee is about to be registered as proprietor of the land, or with his consent in writing duly verified, and in the case of land about to be transferred either by the person actually registered as proprietor of the land, with the consent in writing duly verified of the intended transferee, or by such transferee with the consent in writing duly verified of the registered proprietor. If the application relate to any leasehold land about to be registered, or to land about to be registered with an absolute or qualified title, the application and conditions shall be in accordance with the title examined by the registrar, and if the application relate to any land about to be transferred, the conditions shall be in accordance with any conditions already registered. In any case of conditions being annexed on application under the 84th section, or on first registration as arising on the examination of title, a printed copy of the conditions, or of the document containing them, shall be left in the office, and the registration of such conditions may be made by reference on the register to such printed copy.

On the registration of any leasehold land held under a lease containing a prohibition against alienation without licence, provision shall be made for preventing alienation without such licence by an entry on the register of a reference to such prohibition.

Grant under 82nd Section.

32. Every application to register a grant under the second paragraph of the 82nd section of the act shall be made with the consent in writing duly verified of the person registered, or about by himself or nominee to be registered, as proprietor of the land affected thereby. If the application relate to any land about to be registered with an absolute or qualified title, the grant to be registered shall be in accordance with the title examined by the registrar, and if the application relate to any land already registered it shall be supported by a declaration of the ap-

plicant and his solicitor, which shall state in concise terms the existing rights of the several persons interested in such land, and be left with the application.

The registrar may in any case require such other evidence, if any, and such notices to be given as he may think fit, and the matter to be proceeded with as he may direct.

In any case of an application for registration of a grant under the second paragraph of the 82nd section of the act, a printed copy thereof, and also the original grant for examination and stamping, shall be left in the office with the application. The registration of such grant, and of the particulars and conditions thereof, may be made by a reference to such printed copy on the register of the estate affected by such grant.

The proprietorship of any rent the grant of which is registered under the second paragraph of the 82nd section, may if capable of separate registration under the act be separately registered, notwithstanding the registration of such grant under the second paragraph of the 82nd section.

Land Certificate, Certificate of Charge, and Special Certificate.

33. Every application for a land certificate or certificate of charge shall be made by the registered proprietor entitled to have and requiring the same. A land certificate shall be under the seal of the office, and contain a copy of the registered description of the land, and the name and address of the registered proprietor, and such other matters, if any, as may for the time being be entered on the register as affecting the land, and shall state whether the registered proprietorship is absolute, qualified, or possessory. A land certificate to the transferor under the 29th section may, if the registrar shall so think fit, consist of his subsisting land certificate, if any, altered to correspond with the register, and certified accordingly.

No new land certificate shall be issued under the 29th section to the same proprietor unless the old certificate is delivered up.

A certificate of charge shall be under the seal of the office, and may at the option of the applicant contain either a copy of the entry on the register of such charge, with a reference to or a copy of the registered description of the land, or the same particulars as a land certificate.

The registrar shall, on the application of the registered

proprietor of any land, deliver to him a special certificate, which shall be under the seal of the office, and shall contain a copy of or reference to the registered description of the land or the part thereof to which the application relates, and the name and address of such registered proprietor, and a copy of such other matters as may for the time being be entered on the register as affecting such land, including in the case of leasehold land a copy of or reference to the registered lease; and such certificate shall state, in the case of freehold land, whether the registered proprietorship is absolute, qualified, or possessory, and, in the case of leasehold land, whether any declaration, absolute or qualified, as to the title of the lessor to grant the lease, has been made. Such certificate shall be conclusive evidence of the title of such registered proprietor as appearing by the register. No entry shall be made in the register affecting the land comprised in such special certificate and the estate of such registered proprietor, except on the delivery up of such certificate, until fourteen days have expired from and after the date thereof. A note of such special certificate shall be entered in the register, and also [unless the registrar shall otherwise direct] on the land certificate or office copy lease (if any).

Registered Lease and Office Copy thereof.

34. Every lease or copy of such lease or of a counterpart thereof deposited with the registrar under the 11th section of the act shall be retained in the office during the continuance of such lease.

Application for an office copy of a registered lease shall be made by the registered proprietor entitled to have and requiring the same. The office copy shall be marked as an office copy and authenticated under the seal of the office.

In addition to or as part of the particulars required by the 16th section of the act to be endorsed on an office copy lease, a copy of or a reference to the registered description and the map annexed thereto shall be endorsed on or annexed to such office copy.

Where a fresh office copy is required under the 34th section of the act, in addition to such of the particulars provided by the 16th section of the act, and this rule to be endorsed on an office copy or annexed thereto, as in the registrar's opinion may be applicable, there shall be annexed to such fresh office copy and referred to in an endorse-

ment thereon a copy of the map referred to in the registered description of the part transferred, showing the part so transferred, and an endorsement shall be made on the office copy of the part retained, showing the part disposed of by reference to its registered description, or otherwise.

New Land Certificate, Office Copy Lease, or Certificate of Charge.

35. Every application for a new land certificate or office copy of a registered lease, or certificate of charge to be granted under the 78th section of the act, shall be supported by a declaration of the applicant stating the fact that the former one has been lost, mislaid, or destroyed, and the circumstances thereof, and the new certificate or copy shall contain a statement that it is granted in the place of the certificate or copy lost, mislaid, or destroyed.

Questions arising on Registration.

36. If at any time during the investigation of title, or in any registration proceeding, any question or doubt or dispute arise, notice may, with the consent of the registrar, be given by the applicant to any person interested in such question or doubt or dispute, to the effect that the same will be brought before the registrar at a time to be mentioned in such notice, and that such person may attend before the registrar at such time by himself, or his counsel or solicitor, and take part in the investigation and settlement of such question, doubt, or dispute.

Number of Registered Proprietors.

37. No more than four persons shall at any time be registered as proprietors of the same land or charge. If the number of persons showing title exceed four, such of them not exceeding four shall be registered as they may in writing agree upon, or in case they cannot agree, as the registrar may upon application decide after such notices have been given (if any), and proceedings taken as the registrar may direct.

MISCELLANEOUS.

Applications to be signed.

38. Every application to be made under these rules shall be signed by the applicant or his solicitor.

Further Extracts from Public Maps may be required.

39. If any extract from the public map left in the office should be found to be insufficient or incorrect, the registrar may require a fresh extract to be left in the office for the purposes of registration. The registrar may also require a duplicate of any extract to be left for index purposes.

Abstracts and Documents to be retained in Office.

40. All abstracts and copies of documents and all documents for registration left in the office shall be retained in the office, pending completion of the registration to which they relate, and shall be afterwards dealt with as the registrar shall direct. Abstracts and documents shall be examined with the originals as provided by Rule 8.

The registrar may require an abstract or concise statement to be furnished and duly vouched of any deeds and documents left in the office, and necessary to be perused in the course of any registration proceeding.

Abstracts, &c. to be fairly written.

41. The registrar may refuse to receive any abstract or document that is not fairly written, lithographed or printed, or in conformity with the rules of the office.

Documents executed by Attorney.

42. If any document left in the office for registration purposes has been executed under a power of attorney, the power of attorney shall be produced and, if the registrar shall so direct, left in the office, and the execution thereof by and the identity of the principal and the execution of the document by and the identity of the attorney shall be duly verified, and such evidence furnished, if any, that the power of attorney was effectual at the date of the execution of the document thereunder, as the registrar may direct.

Destruction of exhausted Documents.

43. The registrar may direct the destruction of any instruments in his possession or custody where they have become altogether superseded by entries in the register or have ceased to have any effect.

Stamps and Duties other than Office Stamps.

44. In all cases the party applying for registration shall satisfy the registrar that all stamp and other duties imposed

by any act of parliament have been duly paid and satisfied, but as to succession duty subject to the provisions of the act.

Stationery, Charges, and Office Stamps.

45. All copies, entries, engrossments, or other writing made by a stationery clerk in the office, or by the office stationer, and all stationery and forms supplied by the office in the course of registration, shall be paid for by the applicant. Such charges shall be paid in stamps.

No entry shall be made on the register before the stamps in respect of the fees payable under the act, and any rules thereunder, have been impressed or affixed on some document sent to or lodged in the office with reference to the proposed registration, or as the registrar shall direct, and all expenses payable under the act and rules have been provided for.

For the purpose of determining the stamps in any case where the value of the land does not appear to the satisfaction of the registrar, and is required to be known, the registrar may require such evidence to be furnished as he may think fit of the value of the land.

Every officer of the land registry who shall receive any document to or upon which a stamp shall be affixed or impressed, under the act or rules, shall immediately on receipt of such document deface the stamp thereon. The registrar may refuse to receive in the office any document requiring to be and not duly stamped.

Verification of Instruments.

46. Where the signing or execution of any document is required to be duly verified, such signing or execution shall be attested by a solicitor, and such verification shall be made by his declaration; and where the document is signed or executed by a person named or referred to on the register, such declaration shall identify the person signing or executing the same accordingly.

Declarations.

47. Declarations to be used in the course of registration may be made in the office, or before any person authorized by law to take statutory declarations. The registrar may, if he think fit, require evidence to be given *viva voce* before him. All declarations shall be filed in the office, and office copies thereof (if required) taken for use.

Estates to be distinguished by Numbers.

48. Land separately entered on the register shall be distinguished by a separate number, but so that where the land originally registered is dealt with in separate parcels, each new separate estate shall also refer to the number of the land originally registered, unless the registrar shall otherwise direct.

Substituted Description and Map.

49. If the registered proprietor of any land is desirous that a revised description and map shall be substituted for the then registered description, the registrar shall, upon an order of the court being obtained under the 83rd section of the act, cause a revised description and map to be substituted accordingly, and in that case such substituted description shall thenceforth be the registered description of the land, but without prejudice to the description existing at the time of such substitution, so far as relates to estates previously registered.

Public Maps.

50. The ordnance map comprising the land and its locality on the largest scale for the time being published, not being a smaller scale than that known as the 25-inch scale, shall be the public map of the land. If there is no such map, the map under the "General Inclosure Act, 1845," or in default thereof the tithe map comprising the land and its locality, shall be the public map of the land. In default of any such map, the ordnance map, though on a less scale than the 25-inch scale, shall be the public map, and in that case any extract required to be furnished from the public map shall be explained by a revision and enlargement of such extract in manner provided by the 3rd Rule.

The registrar may at any time declare that any map shall be deemed a public map for the purposes of registration, or, if he think fit, may, with the consent of the Commissioners of the Treasury, cause copies or reprints of any map or parts of any maps to be made, either on the existing or on an enlarged scale, and either revised or not, and may distinguish the land comprised therein by numbers or otherwise, and declare such copies or reprints public maps for the purposes of registration; and where there is no public map on the 25-inch scale or upwards may, with the consent of the Commissioners of the Treasury, cause a

public map to be made on such scale as he may think fit; and in any case in which any such copies, or reprints, or any map shall be declared a public map under this rule, the same, or copies under the seal of the office, shall be deposited in the office, and copies thereof published and sold in such manner and subject to such provisions as the registrar may direct; and after any map or document shall have been so declared a public map, it shall thenceforth, unless the registrar shall otherwise direct, be the public map, reference to which is required for the purposes of registration.

51. After any document has been declared by the registrar to be a public map, the registrar may, if he think fit, require that an extract therefrom shall be attached to the description of any registered land, in explanation of the extract from the public map by reference to which the land shall then be registered, and such new extract shall thenceforth be considered as the extract from the public map by reference to which the registration was made, and the registered description shall be explained accordingly.

Summonses and Production of Public Documents.

52. Upon any summons being issued under the 109th section of the act, the declaration verifying the service thereof shall also prove that the reasonable charges of the attendance of the person summoned, and of his production of the documents (if any) required to be produced, have been paid or tendered to him.

Preparation and Service of Notices.

53. All notices and summonses required to be given or served for any purpose shall be prepared by the applicant on the official forms and under the stamp of the office. If the service of the notices or summonses be personal, it shall be proved by declaration; if the service be through the post, it shall be made by registered letter, and in such case open official envelopes, duly stamped and addressed, and marked outside "Office of Land Registry," and with the word "Registered," and containing the notices stamped, shall be left at the office for postage.

Every notice required to be given shall, if sent through the post, unless returned, be deemed to have been received by the person addressed within seven days, exclusive of the day of posting. On the return of any letter containing any

notice, the registrar shall act in the matter requiring such notice to be given, in such manner as he shall think fit.

Substituted Service.

54. Substituted service on the solicitor or agent of any person shall be deemed good service on such person if the registrar shall so direct.

Discretionary Power of Registrar.

55. The registrar, if he so think fit, may extend the time limited by general rules for any purpose; and where the signing or execution of any document or instrument or any act is required by such rules to be attested and verified or done by a solicitor, may accept such document or instrument though not so attested or verified, and may give such directions in respect of such act though not so done as he may think fit, and upon such terms and conditions (if any) in every such case as he may think proper.

If at any time the registrar is of opinion that any further or other evidence is necessary or desirable, he may refuse to complete any dealing with the register until such further or other evidence has been produced.

The Register.

56. The register shall be made and kept in such mode that in every case where there is a registered proprietor of land, such land and any transactions relating thereto authorized to be entered on the register shall form a separate record in the register, or in such other manner as the registrar shall determine. The registrar may withdraw from the register, by cancellation or otherwise, any notice or entry which he is satisfied no longer affects the registered land. No entry in the register shall be set aside or called in question by reason of any irregularity or informality in any proceeding previous to the making thereof.

Inspection of Register.

57. Every application to inspect any register or document in the custody of the registrar relating to any land or charge, or for copies of or extracts from the same, shall, if not made by the registered proprietor of such land or charge, be made with his consent in writing. All copies or extracts shall be made by a clerk in the office. No document not referred to in the register of the existing

propriatorship shall be inspected without the consent of the registrar. Any person may inspect any general index to the register in the office. The registrar may permit such persons as he thinks proper to inspect and have copies of or extracts from the registered description.

Forms.

58. The forms in the schedule hereto shall be used in all matters to which they refer or are capable of being applied or adapted, with such alterations and additions only as are necessary to meet the circumstances of each case, but no recital, reservation, covenant, declaration, or other provision not referred to in or required by such forms, shall be inserted therein. Official copies of the forms may be supplied through the office, and may, where practicable, be used in all matters to which the forms relate. The registrar may reject any document which is informal, or which he may consider is not in accordance with this rule.

Appeals.

59. Upon any application to the court being made on the requirement of or appeal from the registrar, or for the rectification of the register, under the 96th section, a statement shall be prepared by the applicant and settled and signed by the registrar, and forwarded to the court through the office before the hearing. All applications to the court and appeals from the registrar shall be by summons. No appeal from a decision or order of the registrar, or of the court, shall affect any dealing for valuable consideration duly registered before a notice in writing of such appeal has been lodged in the office on the part of the appellant, and a note thereof made, on his application, in the register.

No appeal shall be brought from a decision or order of the registrar, or of the court, after twenty-eight days from the date of such decision or order, without leave of the court.

Service of any order or official copy order of any court on the registrar shall be made by leaving the same in the office, and an application shall be left at the same time for the rectification of the register being made, or any other act being done in accordance with such order, and the matter shall be proceeded with as the registrar shall direct.

Examination of Married Women.

60. When any married woman is to be examined under the act, in the case of any application to the office of land registry, such application shall be in writing, and the examination shall be made after such application is prepared, and in the case of any consent to be given by any married woman, or of any act to be done by her, or of her becoming a party to any proceeding in the office under the act, the matter or thing to which her consent is to be given, or the act to be done by her, or the proceeding to be taken, shall be reduced into or stated in writing before such examination be made, and the persons or person by whom such examination is made shall certify the result thereof to the satisfaction of the registrar. Such certificate may be to the effect following; that is to say,

"These are to certify that on the day of , 18 , before us , two of the perpetual commissioners appointed for the county of , for taking the acknowledgments of deeds by married women pursuant to an act passed in the third and fourth years of the reign of King William the Fourth, entitled 'An Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,' appeared personally the wife of and produced a paper writing, marked () bearing date the day of , 18 , and identified by our signatures. And we do hereby certify that the said was, at the time of her producing the same paper writing, of full age and competent understanding, and that she was examined by us apart from her husband, touching her knowledge of the contents of the said paper writing, and of the nature and effect of the [*application, disposition, or other act, according to the effect of the paper writing*] therein mentioned, and that we ascertained she was acting with respect thereto freely and voluntarily [** and assented to the disposition, after full explanation of her rights in the land, and of the effect of the proposed disposition.*]"

The paper writing mentioned in the certificate identified by the signatures of the persons making the examination, and the certificate, and, unless the registrar shall otherwise direct, a declaration verifying the certificate, and the

* To be inserted when the married woman is registered as co-proprietor with her husband.

signatures thereto of the persons by whom the same shall purport to be signed, shall be lodged in the office.

Such declaration may be to the following effect :

"I, A. B., of _____, in the county of _____, [make oath and say]:—

"That I know _____, the wife of _____ in the certificate hereunto annexed mentioned, and that the said certificate was signed by _____, of _____, and _____, of _____, the commissioners in the said certificate mentioned, at _____, in the county of _____, in my presence.

"That to the best of my knowledge or belief, neither of the said commissioners is in any manner interested in the transaction giving occasion for such examination, or concerned therein as attorney,* solicitor or agent, or as clerk to any attorney,* solicitor or agent so interested or concerned."

(Sworn or declared, &c.)

The examination of any married woman may be made by the registrar or any person in the office authorized by him in writing, either in any particular case or generally, or by such persons as are authorized to take acknowledgments of deeds by married women under the act of the 3rd and 4th years of King William the Fourth, c. 74, "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance."

Printing, &c.

61. All documents required to be printed, and all printed, lithographed or written documents (other than maps) to be filed in the office, shall be printed, lithographed or written on white foolscap paper, and shall allow a sufficient stitching margin, in order that the same may be conveniently bound.

The registrar may require that any document to be referred to on the register shall be printed for that purpose.

The original of any document required to be printed shall be left in the office. In case no printed copy of such document shall be left in the office, a written copy for the printer should be left, and if no printed copy and no written copy, then a request for making such written-copy and for

* *Sic.*

printing the document through the office, at the applicant's expense, shall be left at the time of leaving such document, or otherwise as the registrar shall direct.

If any extract or tracing from any map is required to be made, the same shall be made at the expense of the applicant, and a deposit to cover such expense shall also be left in the office when required.

Incorporeal Hereditaments, and Mines and Minerals severed from Land.

62. These rules and the forms in the schedule hereto, so far as they are capable of being applied or adapted, shall apply to the registration of the proprietorship of incorporeal hereditaments, and also of mines and minerals, where the same have been severed from the land.

Construction of Terms.

63. In these rules and forms, unless there is something inconsistent in the context, "the act" shall mean "The Land Transfer Act, 1875;" "land" shall include any interest the first proprietorship of which can be separately registered; "the court" shall mean "The Supreme Court of Judicature;" "solicitor" shall include "certificated conveyancer;" and "declaration" shall mean "statutory declaration," and include "affidavit."

Vacations.

64. The holidays and vacations of the office shall be the same as those of the "High Court of Justice,"* but the registrar shall make such arrangements as may be necessary for receiving during the vacations such applications and transacting such business as may require to be immediately attended to.

* See Order LXI. of the First Schedule to "The Supreme Court of Judicature Act, 1875;" Charley's "Judicature Acts," p. 534, second edition.

FORMS.

THE SCHEDULE.

FORM 1.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Application for Registration of First Proprietorship.

A. B., of, &c., being entitled for his own benefit to an estate in fee simple in the land, in the parish of in the county of called or known as containing by estimation [or, as the case may be, according to the 5th, 68th or 69th, and 11th or 82nd sections of the Act] comprised in the description left herewith, applies to be registered [or, where applicable, to have registered in his stead, C. D., of &c.] as proprietor of such land, [or, leasehold land] with [in the case of freehold land] a possessory title, [or, with an absolute title, or, in the case of leasehold land, with or without a declaration of the lessor's title to grant the lease, as the case may be].

If the mines and minerals are required to be registered under the 18th section, it should be expressly stated in the application, and affirmative evidence produced.

The address of the said A. B. [and C. D., respectively] for service is as above, [or if the application is made through a solicitor, at the office of such solicitor].

Dated this day of , 18 .

[Signature of the applicant or his solicitor.]

The above-mentioned C. D., [or the vendor or the person whose consent is required to the execution of the trust or power to sell] hereby consents to the above application.

[Signature of C. D., or the vendor or his solicitor, or of the other consenting parties.]

FORM 2.

No. The Land Transfer Act, 1875.
Office of Land Registry.

In the matter of the application of

Description of Land under the 3rd Rule.

The freehold [or, leasehold] land hereinafter particularly described, or so much thereof as is comprised in and edged with red on the extract left herewith from the public map of the locality of the land, that is to say [here insert ordinary description of parcels.]*

Dated the day of

[Signature of the applicant or his solicitor.]

Note.—Where necessary add the particulars required by the 7th Rule, i. e., the names, addresses and description of the tenants, lessees, incumbrancers and lord of the manor, if any.

*Add "together with the mines and minerals under the same," if included.

FORM 3.

No. The Land Transfer Act, 1875.
Office of Land Registry.

In the matter of the application of

Declaration in Support of Possessory Title.

We, A. B., of, &c. and C. D., of, &c., the solicitor of the said A. B., severally, solemnly and sincerely declare as follows to the best of our respective knowledge, information and belief :

1. That the paper writing marked with the letter A., produced to us at the time of our making this declaration, contains a true description of the property the subject of the above application, and that the extract marked B., also produced to us at the time of our making this declaration, and purporting to be an extract from the [here describe public map], is a correct and proper extract from such map, and comprises within the part edged with red the land more particularly described in the said paper writing marked A., and no more than such land, and that such map is the public map, as defined by the 50th of the General Rules, dated the 24th day of December, 1875, of the Office of Land Registry.

2. That the applicant is well entitled for his own benefit to an estate in fee simple [or otherwise, as the case may be, according to Rule 6] in the property the subject of the above application, free from [or subject to] incumbrances, and that the actual possession or receipt of the rents and profits thereof

is in accordance with the title of the said _____, and that the said _____ is entitled under the Act to be registered as the proprietor of the said property.

3. That the documents of title mentioned in the schedule hereto comprise amongst others [*if the fact be so*] the last conveyance [*or other document*] under which the applicant's title is derived, and that [*if the fact be so*] upon the said documents being stamped or otherwise marked under the 72nd section of the Act, the registration cannot be concealed from any person dealing with the property.

4. That the means of such our respective knowledge, information and belief are as follows; that is to say [*here state the means of knowledge*].

And we respectively make, &c.

THE SCHEDULE.

FORM 4.

No. _____ The Land Transfer Act, 1875.

Office of Land Registry.

In the matter of the application of _____.

Declaration verifying Description and Particulars in the case of Absolute and Leasehold Title.

We, A. B., of, &c. and C. D., of, &c., the solicitor of the said A. B., severally and sincerely declare that to the best of our respective knowledge, information and belief:

1. The paper writing marked with the letter A. produced to us at the time of our making this declaration contains a true description of the property the subject of the above application [*and a true and complete statement of the names, addresses and descriptions of the tenants, lessees, and incumbrancers thereof, and the lord of the manor, if any, in which the property is situate or of which it is held*], and that the extract marked B. also produced to us at the time of our making this declaration and purporting to be an extract from the [*here describe public map*] is a correct and proper extract from such map, and comprises within the part edged with red the land more particularly described in the said paper writing marked A., and no more than such land, and that such map is the public map as defined by the 50th of the General Rules dated the 24th day of December, 1875, of the Office of Land Registry.

2. That the property comprised in the said application is the same property as was comprised in and expressed to be

conveyed by a deed dated the day of , 18 , and made between by the description in the schedule hereto.

3. That the actual possession or receipt of the rents and profits of the property comprised in the said application is in accordance with the title of the applicant as stated in the application.

4. That the means of such our respective knowledge, information and belief are as follows; that is to say [*here state the means of knowledge*], &c.

And we severally make, &c.

The SCHEDULE hereto.

Here set forth the description from the deed referred to, or where the parcels are long the abstract may be referred to and made an exhibit.

FORM 5.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Advertisement and Notice of Application.

NOTICE.—A. B., of, &c., has applied to be registered [or to have registered in his stead C. D., of, &c.] as proprietor with an absolute title of the freehold land in the parish of in the county of , called or known as , containing by estimation [*or otherwise, as the case may be*], comprised in the description left in this office [*and numbered on the ordnance or other public map, as the case may be, or otherwise identifying the land, together with the mines and minerals under the same.*] Any person desirous of objecting may come in and make his objection to the Registrar, by leaving a notice in writing, signed by him or his solicitor, stating the particulars of the objection, and an address in the United Kingdom on which service on him shall be made, and on lodging such objection in this office within three months from the date hereof. The aforesaid description may be inspected at this office.

Dated this day of , 18 .

[*Signature of chief clerk and of applicant or his solicitor.*]

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FORM 6.

No. The Land Transfer Act, 1875.

Office of Land Registry.

In the matter of the application of

Statement of Title to be furnished by the Applicant under the 12th Rule.

Name, address, and description of proprietor to be entered on the register, and the nature of his proprietorship and title, and the qualifications, if any, of the title.	The incumbrances, including leases and agreements for leases, if any, to be entered on the register.	In case of leasehold land, any entry required to be made in respect of a declaration of the title of the lessor to grant lease, and of any prohibition in lease against alienation without licence.	Any other entry authorized by the Act to be made on the register, and the entry of which is required or ought to be made.	If the description of the parcels require alteration, the particulars of such alteration.

Dated this day of 18 .

[Signature of the applicant or his solicitor.]

N.B.—This statement should be left in duplicate. The statement, as settled by the Registrar, will be in the form of the entries for the Register.

FORM 7.

No. The Land Transfer Act, 1875.

Office of Land Registry.

In the matter of the application of

Notice of Settlement of Statement of Title under the 12th Rule.

Take notice that the Registrar on the day of 18 settled the statement of title, for the purpose of registration, of the land called or known as [*here insert concise description*] contained in the above application, and that such statement may be inspected in the office by any person who has satisfied, or shall satisfy, the Registrar that he

ought to be allowed to inspect the same, and any objection to be made to such statement must be made in writing, signed by the objector or his solicitor, and left in the office within* one month from the date aforesaid.

Dated this day of 18 .
[*Signature of chief clerk and of applicant or his solicitor.*]
To

*If the one month would expire before the expiration of three months from the date of the first advertisement, if any, the date of such expiration should be here substituted.

FORM 8.

No. The Land Transfer Act, 1875.

Office of Land Registry.

In the matter of the application of

Objection.

C. D., of, &c., hereby gives notice that he objects to* the registration of A. B. as proprietor of the land called or known as [*or otherwise identified*], in the parish of in the county of , comprised in the above application.

The particulars of the objection of the said C. D. are [*here state concisely particulars of objection*].

The address of C. D. for service is , in the parish of in the county of .

Dated this day of 18 .
[*Signature of the objector or his solicitor.*]

To

*If the objection relate to the statement of title, here insert "the statement of title as settled by the registrar on the application for"

FORM 9.

No. The Land Transfer Act, 1875.

Office of Land Registry.

In the matter of the application of

Notice to Objector.

Notice that the objection lodged by you to the* registration of A. B., of, &c., as proprietor of the land called or known as in the parish of in the county of , is appointed to be heard before the Registrar, at the Office of Land Registry, on the † day of 18 , at o'clock, and that you may attend and be heard before the Registrar, at such time and place by yourself, or by your counsel or solicitor, and may then and there show cause, by affidavit or otherwise, in support of your objection.

Dated the day of 18 .
[*Signature of applicant or his solicitor.*]

To

*If the objection relate to the statement of title, here insert "the statement of title as settled by the registrar on the application for"

†Not less than seven clear days' notice to be given.

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FORM 10.

The Land Transfer Act, 1875.

Office of Land Registry.

In the matter of the application of

Declaration under 70th section.

We, A. B., the above-named applicant [*or*, the vendor of the land the subject of the above application], and C. D., of, &c., the solicitor of the said A. B., severally, solemnly, and sincerely declare to the best of our respective knowledge, information, and belief, as follows: that all deeds, wills, and instruments of title, and all charges and incumbrances affecting the title to the land which is the subject of the above application, and all facts material to such title, have been disclosed in the course of the investigation of the title made by the Registrar.

That the means which we have had respectively of becoming acquainted with the several matters above referred to, and of such our knowledge, information, and belief, are as follows [*here state the means of knowledge*].

I the said A. B. say, &c.

And I the said C. D. say, &c.

And we severally make, &c.

FORM 11.

The Land Transfer Act, 1875,

Office of Land Registry.

Caution (under 60th section) before Registration.

I, A. B., of, &c., have such an interest in the land particularly described in the statutory declaration bearing even date herewith, and made by me and left in the Office of Land Registry, in support of this caution, as entitles me to object to any disposition thereof being made without my consent, and I am entitled to notice of any application that may be made for the registration of such land.

My address for service of notice is _____, in the parish of _____, in the county of _____.

Dated this _____ day of _____, 18 _____.

[*Signature of the cautioner or his solicitor.*]

FORM 12.

The Land Transfer Act, 1875.

Office of Land Registry.

*Declaration under the 61st section in Support of
Caution lodged under the 60th section.*

I, A. B., of, &c., do solemnly and sincerely declare as follows :

1. The land affected by the caution, dated the day of , lodged by me with the Registrar of the Office of Land Registry, is the land described in the schedule hereto, or so much thereof as is comprised in and edged with red on the extract annexed hereto from the [*here describe public map*] of the locality of the land, and that such extract is a correct and proper extract from such map, and comprises, to the best of my knowledge, information, and belief, within the part edged with red, the land more particularly described in the schedule hereto, and no more than such land. And that such map is the public map as defined by the 50th of the General Rules, dated the 24th day of December, 1875, of the Office of Land Registry.

An extract from the public map, enlarged and revised where necessary, must be annexed to the declaration.

2. That my interest in the said land entitles me to object to any disposition of the said land being made without my consent, and that the nature of such my interest is as follows [*here state particulars of cautioner's interest*].

And I make, &c.

Dated this day of , 18 .

The SCHEDULE above referred to.

[*Here insert ordinary description of the land to be affected by the caution.*]

FORM 13.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Notice to Cautioner (under 60th and 62nd sections).

Notice.—C. D., of, &c., has applied to be registered [*or to have registered in his stead E. F., of, &c.*] as proprietor of the land in the parish of , in the county of , affected by the caution, dated the day of , 18 , lodged by you in the Office of Land Registry; and if you intend to appear and oppose such registration you are to enter an appearance for that purpose at the said office before

FORMS.

the expiration of fourteen days from the date of the service of this notice.

Dated the day of , 18 .
*[Signature of the chief clerk and of the applicant
 or his solicitor.]*

To

FORM 14.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Caution (under 53rd section) after Registration.

I, A. B., of, &c., being interested in the land registered in the name of under the number in the Office of Land Registry [*or in the charge registered the day of , 18 , in the name of E. F., of, &c., on the lands, &c., as the case may be*] require that no dealing with such land [*or charge*] be had on the part of the registered proprietor until notice has been served upon me.

My address for service of notice is at , in the county of .

Dated this day of , 18 .
[Signature of the cautioner or his solicitor.]

FORM 15.

No. The Land Transfer Act, 1875.

Office of Land Registry.

*Declaration in support of Caution lodged under
 the 53rd section.*

I, A. B., of, &c., do solemnly and sincerely declare as follows :

1. The land [*or charge*] to which the caution dated the day of , 18 , lodged by me with the Registrar of the Office of Land Registry applies, is the land [*or charge*] registered the day of , 18 , in the name of on the land] registered in the name of , under the number in the said office.

2. That I am interested in such land [*or charge*], and that the particulars of my interest are as follows [*here state particulars*].

And I make, &c.

FORM 16.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Notice to Cautioner (under 53rd and 54th sections).

Notice.—The caution lodged by you in this office on the day of 18, requiring that no dealing with the land [or charge registered the day of 18, in the name of on the land] registered in the name of under the number should be had on the part of the registered proprietor until notice had been served upon you, will cease to have any effect after the expiration of 14 days next ensuing the date at which this notice is served, and that after the expiration of such time as aforesaid the caution will cease unless an order to the contrary is made by the Registrar.

Dated the day of 18.

[Signature of Registrar, and official stamp of Office.]

To

the cautioner.

FORM 17.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Application for inhibiting Order.

C. D., of, &c., being interested in the land registered in the name of under the number in the Office of Land Registry [or in the charge registered the day of 18, in the name of on the land, &c., as the case may be], hereby requests the Registrar to inhibit until further order or entry, [or otherwise, as the case may be,] any dealing with the said land [or charge].

The grounds of this application, and the evidence to be produced in support thereof, are stated or referred to in the declaration of the said C. D. [or of E. F., the solicitor of the said C. D.] filed herewith.

Declaration to be filed stating particulars of applicant's title.

Dated, &c.

[Signature of C. D. or his solicitor.]

FORM 18.

No. The Land Transfer Act, 1875.
Office of Land Registry.

Application to register Restriction.

A. B., the registered proprietor of the land No. on the register, requests the Registrar to make an entry in the register that no transfer shall be made of, or charge created on, such land, unless [*here insert the terms of the restriction required to be entered*].

Dated the day of 18 .
[*Signature of proprietor.*]

FORM 19.

No. The Land Transfer Act, 1875.
Office of Land Registry.

Application to withdraw or modify Restriction.

A. B., the registered proprietor of the land No. on the register, C. D., of, &c., and E. F., of, &c., request that the restriction on transferring or charging the land No. on the register, a note whereof was made on the register on the day of 18 , may be withdrawn [*or modified in the following manner, here state the nature of the modification required*].

Dated the day of 18 .
*[*Signatures of A. B., C. D., E. F., &c.*]

Witness to all the signatures,
X. Y., a solicitor.

FORM 20.

No. The Land Transfer Act, 1875.
Office of Land Registry.

Charge.

I, A. B., the registered proprietor of the land entered in the register under the above number, in consideration of [*four thousand pounds*] paid to me, charge such land with the payment to C. D., of, &c., on the day of 18 , of the principal sum of [*4,000l.*] with interest at the rate of l. per cent. per annum, and with a power of sale to be exercised after the day of 18 .

Dated the day of 18 .
[*Signature of registered proprietor.*]

Witness,
X. Y., a solicitor.

*The applicants must be all the persons interested in the restriction.

Note.—If no interest is to be payable, or no power of sale given, substitute the words "without interest," or "without a power of sale," as the case may be.

FORM 21.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Transfer of Charge.

I, C. D., the registered proprietor of the charge dated the day of , 18 , and registered the day of , 18 , on the land registered in the name of A. B., under the above number, in consideration of [*four thousand pounds*] paid to me, transfer such charge to E. F., of, &c., as proprietor.

Dated the day of , 18 .
[*Signature of registered proprietor.*]

Witness,

X. Y., a solicitor.

FORM 22.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Application to notify Cessation of Charge, under 28th section, by the registered proprietor thereof.

A. B., of, &c., the registered proprietor of the charge registered the day of , 18 , in his name on the land No. registered in the name of hereby requests the Registrar to notify on the Register the cessation of the said charge.

N.B.—The application will vary according to circumstances.

Dated the day of , 18 .
[*Signature of A. B.*]

Witness,

X. Y., a solicitor.

FORM 23.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Transfer of Freehold or Leasehold Land.

I, A. B., the registered proprietor of the freehold [*or leasehold*] land entered in the Register under the above number, in consideration of [*five thousand pounds*] paid to me, transfer such land to C. D., of, &c.

Dated the day of , 18 .
[*Signature of registered proprietor.*]

Witness,

X. Y., a solicitor.

FORM 24.

No. The Land Transfer Act, 1875.

Office of Land Registry.

*Transfer of Freehold or Leasehold Land in
Parcels.*

I, A. B., the registered proprietor of the freehold [*or leasehold*] land entered in the Register under No. , and registered with an absolute title [*or with a qualified or with a possessory title, or in the case of leaseholds with a declaration that the lessor had an absolute or qualified title to grant the lease, or without the declaration of the title of the lessor, as the case may be*] in consideration of [*one thousand pounds*] paid to me, transfer to C. D., of, &c., the land hereinafter particularly described, or so much thereof, being part of the land now registered under No. , as is comprised in and edged with red on the extract annexed hereto from the public map of the locality of the land, referred to in the registered description No. , that is to say [*here insert parcels dealt with to be extracted from the registered description under the original No. .*]

Dated this day of , 18 .
[*Signature of registered proprietor.*]

Witness,
X. Y., a solicitor.

FORM 25.

No. The Land Transfer Act, 1875.

Office of Land Registry.

*Application for Entry to be made in Register,
negating Implied Covenants under 39th
section.*

A. B., the registered proprietor of the land No. , on the Register, and C. D., of, &c., the transferee named in the instrument of transfer dated the day of , 18 , and lodged herewith, request the Registrar to make an entry in the Register to the effect following; that is to say [*here state the implied covenants to be negated.*]

Dated the day of , 18 .
[*Signatures of transferor and transferee.*]

Witness to both signatures,
X. Y., a solicitor.

FORM 26.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Transmission of Registered Proprietorship.

Application under 42nd, 43rd, or 47th sections.

A. B., the registered proprietor of the land [or, charge dated the day of , 18 , on the land, &c., as the case may be], No. on the Register, died on the day of , 18 [or otherwise, as the case may be, within the 42nd, 43rd, or 47th sections of the Act], C. D., of, &c., is entitled to the said land [or charge], and applies to be registered as the proprietor thereof accordingly.

The evidence in support of the above application consists of [here state the evidence to be lodged herewith].

Dated the day of , 18 .
[Signature of C. D., or his solicitor.]

FORM 27.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Application under 41st or 44th section.

A. B., the registered proprietor of the land No. on the Register, died on the day of , 18 [or otherwise, as the case may be], C. D., of, &c., being interested in the said land applies to be registered [or, to have E. F., of, &c., registered] as proprietor of the said land.

The interest of the said C. D. [or E. F.], and the existing rights of the several other persons interested in the said land, are stated in the declaration of the said C. D. and G. H., of, &c., the solicitor of the said C. D., filed herewith, and the other evidence in support of this application is left herewith.

Declaration,
&c. to be
left with ap-
plication.

Dated the day of , 18 .
[Signature of C. D., or his solicitor.]

FORM 28.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Application under 52nd section.

C. D., of, &c., being entitled to an estate in dower or by the curtesy in the land numbered on the Register, and of

which land A. B. is the registered proprietor, applies that notice of such estate may be entered on the Register.

Declaration,
&c. to be
left with ap-
plication.

The existing rights of the several persons interested in the said land are stated in the declaration of C. D. and G. H., of, &c., the solicitor of the said C. D., filed herewith, and the other evidence in support of this application is left herewith.

Dated this day of , 18 .
[Signature of C. D., or his solicitor.]

FORM 29.

No. The Transfer of Land Act, 1875.
Office of Land Registry.

Application to notify Cessation of Incumbrance or Lease entered on Register on first Regis- tration.

A. B., the registered proprietor of the Land, No. on the Register, hereby requests the Registrar to notify on the Register the cessation of the incumbrance [*describing it*], [*or the determination of the lease, describing it*], entered upon the Register, the same being discharged [*or determined*], as appears by the abstract of title marked A. [*or as appears from the receipt endorsed upon the instrument of incumbrance, or otherwise, as the case may be*], and the declaration of lodged herewith.

Dated the day of , 18 .
[Signature of A. B., or his solicitor.]

FORM 30.

No. The Land Transfer Act, 1875.
Office of Land Registry.

Application of Registration of Notice of Lease, or Agreement of Lease, under 50th and 51st sections.

*If the registered proprietor of the land concurs in the application, these words in brackets will be omitted; if otherwise, the words following,

C. D., of, &c., being interested in the land numbered on the Register, of which A. B. is the registered proprietor, by reason of a lease [*or agreement for a lease*], the particulars of which are stated in the schedule hereto, hereby requires the Registrar to enter a notice of the said lease [*or agreement*], upon the Register* [*in accordance with the order lodged herewith*], in the terms following, that is to say [*here state the terms of notice agreed upon, and which must be a concise notice merely*].

A. B., the registered proprietor of the above land, concurs in this application.

Dated this day of , 18 .

Witness to the signature of C. D.

[Signatures of C. D. & A. B.]

Witness to the signature of A. B.,

X. Y., a solicitor.

The SCHEDULE.

[Here insert shortly particulars of the lease or agreement.]

referring to the terms of the notice, and the last paragraph must be omitted, and the order left in the office with the application.

FORM 31.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Application under 18th section.

A. B., the registered proprietor of the land, No. on the Register [or otherwise, as the case may be, describing the interest of the applicant and the land], requests the Registrar to notify on the Register the fact that the land is [exempt from land tax, or that the right to the mines and minerals in the land is vested in the said A. B. as proprietor of the land, and to register the said A. B. as proprietor of such mines and minerals, as well as of the land, or otherwise, as the case may be.]

Dated this day of , 18 .

[Signature of A. B., or his solicitor.]

FORM 32.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Applications to annex Conditions to Registered Land.

A. B., the registered proprietor of the land numbered on the Register, and part of which is about to be transferred to C. D., of, &c., pursuant to the instrument of transfer left herewith, hereby requests the Registrar to register as annexed to the part of the land to be so transferred the conditions, a printed copy of which is left herewith.

The said C. D. consents to this application.

Dated this day of , 18 .

[Signatures of A. B. & C. D.]

Witness,

X. Y., a solicitor.

FORMS.

FORM 33.

No. The Land Transfer Act, 1875.

Office of Land Registry.

*Application to annex Conditions to Land about
to be registered.*

A. B., of, &c., being about by himself or nominee to be registered as proprietor of the land called or known as in the parish of in the county of comprised in the application of the said A. B. for registration dated the day of , 18 , requests the Registrar to register as annexed to the said lands the conditions, a printed copy of which is left herewith.

Dated this day of , 18 [Signature of A. B.]

Witness,
X. Y., a solicitor.

FORM 34.

No. The Land Transfer Act, 1875.

Office of Land Registry.

In the matter of the application of .

*Application to register Grant under 2nd para-
graph of 82nd section (relating to Land about
to be registered).*

E. F., of, &c., being interested in the fee simple estate in the freehold land called or known as in the parish of in the county of of which A. B., of, &c., by himself or nominee, is about to be registered as proprietor, by reason of the [fee farm] grant dated the day of , 18 , which with a printed copy thereof is left herewith, hereby requests the Registrar to register the said grant accordingly.

The said A. B. consents to this application.

[Signatures of E. F. & A. B.]

Witness to all the signatures,
X. Y., a solicitor.

FORM 35.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Application to register Grant under 2nd paragraph of 82nd section (relating to Registered Land).

C. D., of, &c., being interested in the fee simple estate in the freehold land numbered on the register, of which A. B. is the registered proprietor, by reason of the [fee farm] grant dated the day of , 18 , which with a printed copy thereof is left herewith, hereby requests the Registrar to register the said grant accordingly.

The declaration of the said C. D., and of E. F., his solicitor, stating the existing rights of the several persons interested in the land, is left herewith.

The said A. B. consents to this application.

Dated this day of , 18 .

[Signatures of C. D. (or his solicitor) and A. B.]

Witness to the signature of A. B.,

X. Y., a solicitor.

FORM 36.

No. The Land Transfer Act, 1875.

Office of Land Registry.

Application for Land Certificate [or Certificate of Charge, or Office Copy Lease.

A. B., the registered proprietor of [a charge dated the day of , 18 , and registered the day of , 18 , on the freehold [or leasehold] land numbered on the Register, hereby requests the Registrar to deliver to him a land certificate [or certificate of charge, or an office copy of the registered lease, as the case may be].

* A. B. desires that the certificate of charge shall contain the same particulars as a land certificate [or otherwise according to Rule 37].

Dated the day of , 18 .

[Signature of A. B., or his solicitor.]

*To be added if application be for certificate of charge.

FORM 37.

No. The Land Transfer Act, 1875.

Office of Land Registry.

*Declaration attesting Execution of Instrument
and Identifying Owner.*

I, G. H., of, &c., a solicitor of the Supreme Court of Judicature, do solemnly and sincerely declare that I am well acquainted with A. B., the person named in the document dated the day of , 18 , marked A. now produced to me, that I saw him sign the said document, that the name A. B. at the foot thereof is the handwriting of the said A. B., and that the said A. B. is the same person as A. B. who is named in the Register as the proprietor of [the charge dated the day of , 18 , and registered the day of , 18 , on] the land entered on the Register under the number .

And I make, &c.

Dated this day of , 18 .

ORDER AS TO FEES

UNDER SECT. 112.

By virtue and in pursuance of "The Land Transfer Act, 1875," I, the Right Honorable HUGH MACCALMONT BARON CAIRNS, Lord High Chancellor of Great Britain, with the concurrence of the Lords Commissioners of her Majesty's Treasury, do order that the Fees in the Schedule hereto shall be paid under the said Act.

Dated this 30th day of December, 1875.

CAIRNS, C.

We certify that this Order is made with the concurrence of the Commissioners of her Majesty's Treasury.

R. WINN.

J. D. H. ELPHINSTONE.

THE SCHEDULE OF FEES.

	£	s.	d.
For every abstract lodged in the office	0	10	0
For examination of abstract with deeds, where made by clerks in the office, for every hour or part of an hour so engaged	0	5	0
For the entry of first proprietorship, if the value of the property does not exceed 1,000 <i>l.</i> , for every 100 <i>l.</i> or fractional part of 100 <i>l.</i> of the value thereof ..	0	5	0
If the value exceed 1,000 <i>l.</i> , but does not exceed 5,000 <i>l.</i> , then for the first 1,000 <i>l.</i> at the rate aforesaid, and for every additional 100 <i>l.</i> or fractional part of 100 <i>l.</i> of the value thereof beyond the first 1,000 <i>l.</i>	0	3	0

	£	s.	d.
If the value exceed 5,000 <i>l.</i> , but does not exceed 20,000 <i>l.</i> , then for the first 5,000 <i>l.</i> at the rate aforesaid, and for every additional 100 <i>l.</i> or fractional part of 100 <i>l.</i> of the value thereof beyond the first 5,000 <i>l.</i>	0	2	0
If the value exceed 20,000 <i>l.</i> , then for the first 20,000 <i>l.</i> at the rate aforesaid, and for every additional 100 <i>l.</i> and fractional part of 100 <i>l.</i> of the value thereof beyond 20,000 <i>l.</i>	0	1	0
In the case of a possessory title Half of such of the above fees as are applicable.			
For every land certificate or office copy lease:—			
If the value of the property comprised therein does not exceed 1,000 <i>l.</i>	0	7	0
If the value exceed 1,000 <i>l.</i> , but does not exceed 5,000 <i>l.</i>	0	15	0
If the value exceed 5,000 <i>l.</i> , but does not exceed 10,000 <i>l.</i>	1	0	0
If the value exceed 10,000 <i>l.</i> , but does not exceed 20,000 <i>l.</i>	2	0	0
If the value exceed 20,000 <i>l.</i> , but does not exceed 40,000 <i>l.</i>	3	0	0
If the value exceed 40,000 <i>l.</i>	5	0	0
For every special land certificate	0	5	0
For altering land certificate under 29th section	0	10	0
For an endorsement under 34th section on an office copy registered lease, not being then first issued	0	10	0
For every new land certificate or office copy of registered lease, where the original certificate or office copy is lost, mislaid or destroyed. The same fee as on an original certificate or office copy.			
For every certificate of charge	0	5	0
For the registration of any change of proprietorship of land (except under the 43rd section), if the value does not exceed 1,000 <i>l.</i>	0	5	0
If the value exceed 1,000 <i>l.</i> , then for the first 1,000 <i>l.</i> at the rate aforesaid, and for every additional 500 <i>l.</i> or fractional part of 500 <i>l.</i> of the value thereof beyond the first 1,000 <i>l.</i>	0	1	0
For registration of every charge or transfer, or transmission of charge (except under the 43rd section), where the principal sum does not exceed 1,000 <i>l.</i>	0	2	6
If the principal sum exceed 1,000 <i>l.</i> , then for the first 1,000 <i>l.</i> at the rate aforesaid, and for every additional 500 <i>l.</i> or fractional part of 500 <i>l.</i> of the amount of such charge beyond 1,000 <i>l.</i>	0	0	6
For any entry in respect of a deposit of a land certificate. The same fee as for a charge for the amount secured by the deposit.			

	£	s.	d.
For entry of notice of lease or agreement where the term granted or agreed to be granted exceeds 21 years	0	5	0
Where the term does not exceed 21 years	0	2	6
For notifying the determination of any lease or charge	0	7	0
For notifying cessation of incumbrance	0	7	0
For every caution, whether before or after registration	1	0	0
For entry of restrictions under the 58th section	1	0	0
For withdrawal or modification of restrictions	0	7	0
For every order or entry made under 57th section	1	0	0
For removal of any caution	0	7	0
For every entry under third clause of 83rd section	0	10	0
For every entry of change of proprietorship under 43rd section	0	10	0
For every entry under the 18th section (if made after first registration)	0	10	0
For entry of any grant of rent under second paragraph of 82nd section, if land affected thereby be registered with an absolute or qualified title.	The same fee as for the first entry of land with an absolute or qualified title of the value of the rent at 30 years' purchase.		
If such land be registered with a possessory title.	The same fee as for the first registration of land with a possessory title of the value of the rent at 30 years' purchase.		
For any entry under 52nd section	The same fees as for a charge of the same value as the estate to be entered, to be ascertained as the Registrar may direct.		
For any entry negating implied covenants, powers or priorities, on charge or transfer of any freehold or leasehold land under the provisions of the act	0	10	0
For annexing conditions to land	0	10	0
For entry of modifications or discharge of conditions	0	10	0
For every entry on the register for which no other fee is provided	0	5	0
For application for rectification of the register under the 95th or 96th sections	0	5	0
For rectification of register under 95th or 96th sections	0	10	0
For every statement for the court signed by the registrar	0	10	0
For every examination of a married woman in the office	0	10	0
For inspection of register by the registered proprietor, or with his consent, for each separate estate	0	5	0

	£	s.	d.
For the like inspection of description only, for each separate estate	0	2	6
For searching index kept in the office for each parish	0	2	6
For inspecting the description, with the consent of the registrar for each parish	0	2	6
For inspection of any document not referred to on the register.. .. .	0	2	6
For every affidavit or declaration filed in the office ..	0	2	6
For every summons to attend the registrar	0	3	0
For every notice under the official stamp	0	1	0
For every affidavit or declaration sworn or taken in the office	0	1	6
For every exhibit marked in the office	0	1	0
For office extract from, or copy of, any entry in the register, if not exceeding one folio	0	5	0
For every additional folio or part of a folio	0	2	6

STATIONER'S CHARGES, &c.

For copy of any document, per folio or part of a folio	0	0	2
For every office copy, per folio or part of a folio. (In the case of an office copy lease this fee is payable in addition to the fee above charged)	0	0	4
For every entry in the register of proprietorship or in the register of parcels, or engrossment of or alteration in land certificate, per folio or part of a folio	0	0	6
For envelopes, or stamping same with the office stamp, each	0	0	1
The stationer's charge for tracings or copies of maps is payable by the applicant.			

RE-REGISTRY OF ESTATES

ALREADY REGISTERED UNDER "THE LAND
REGISTRY ACT, 1862."

ORDERS UNDER SECTION 126.

By virtue and in pursuance of "The Land Transfer Act, 1875," I, the Right Honorable HUGH MACCALMONT BARON CAIRNS, LORD HIGH CHANCELLOR OF GREAT BRITAIN, do make the following Orders:—

1. Any person or persons appearing from the Register kept pursuant to the Act of the 25 & 26 Vict. c. 53, hereinafter called "The Land Registry Act, 1862," to be entitled to such an estate or interest as would enable him or them to make an original application under "The Land Transfer Act, 1875" (hereinafter called the Principal Act), to be registered as first proprietor or first proprietors, or to have a nominee or nominees registered in his or their stead if not registered under "The Land Registry Act, 1862," or if there be no such person or persons, then

any person or persons appearing from the said Register to be beneficially interested, may at any time after the commencement of the Principal Act, and with the consent of such persons, if any, as the Registrar may think proper, apply to be registered, or (if the case so admit) to have registered in his or their stead a nominee or nominees as proprietor or proprietors, and the Registrar may register him or them in the same manner, and with the same incidents in and with which the Registrar is by the Principal Act empowered to register the proprietorship of land, and such registration shall be made without the payment of any official fees.

2. Upon any application under these Orders the Registrar may dispense with any of the proceedings under the General Rules made under the Principal Act as he shall consider proper to be dispensed with and the matter shall be proceeded with as the Registrar shall direct.

3. Upon any registration being made under these Orders, the Register under "The Land Registry Act, 1862," shall be closed, and a note made thereon that the land is registered under the Principal Act. And the registry under the Principal Act shall be subject to the entries in the said Register at the closing thereof, and to any rights acquired in pursuance of registry under "The Land Registry Act, 1862."

4. The Registrar may at any time after the said Register has been closed, direct the delivery out of office copies of or from the Register as at the date of the closing thereof, to any person who shall satisfy

him that the same ought to be delivered to him ; and such office copies shall be *primâ facie* evidence of the entries contained in the Register in respect of the several matters mentioned in such office copies.

5. Any person aggrieved by any order of the Registrar under these Orders may appeal to the Court in the manner provided by the General Rules of the 24th day of December, 1875.

Dated the 1st day of January, 1876.

CAIRNS. C.

DECLARATION ON RE-REGISTRATION.

FORM 38.*

No. The Land Transfer Act, 1875.
 Office of Land Registry.

IN THE MATTER OF the application of

I of do solemnly and sincerely declare that I have not been party or privy to any sale, mortgage, deed, instrument, act or thing under or by virtue of which any estate or interest, contract or engagement, for the registration whereof provision is made by the Act of 25 & 26 Vict. c. 53, is now subsisting or capable of taking effect in the hereditaments the subject of this application and registered under the last-mentioned act under the No. or in any part of the said hereditaments which is not entered or mentioned in the Register under the said act, and that to the best of my knowledge, information and belief, there is no unregistered estate or interest, contract or engagement, for the registration whereof provision is made by the last-mentioned act, subsisting or capable of taking effect in the said hereditaments, or any part thereof, and that I am entitled to be registered as the proprietor of the said hereditaments, with an absolute title under "The Land Transfer Act, 1875," subject only to the entries now appearing from the Register under the Act of 25 & 26 Vict. c. 53:

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled "An Act to Repeal an Act of the present Session of Parliament, intituled 'An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof, and for the more entire Suppression of voluntary and extra-judicial Oaths and Affidavits, and to make other Provisions for the Abolition of unnecessary Oaths.'"

* This Form was issued subsequently to the other Forms by the Registrar, under sect. 108.

VI. PARTITION ACT, 1868, AMENDMENT.

39 & 40 VICT. C. 17.

AN ACT TO AMEND THE PARTITION ACT, 1868.

COPARCENERS were compellable, at common law, and joint tenants and tenants in common were compellable by the statutes 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, to make partition of the lands held by them in coparcenary, joint tenancy or tenancy in common, respectively (*a*). The action-at-law to enforce partition was commenced by a writ called *Breve de partitione faciendâ* (*b*). As early as the 40th Eliz. a new compulsory mode of partition sprang up, namely, by decree of the Court of Chancery exercising its equitable jurisdiction, on a bill filed, praying for a partition (*c*), and a commission usually issued for the purpose of making the partition. The Court of Chancery interfered, on account of the extreme difficulty attending the process of partition by action-at-law, and based its jurisdiction on the rule of the civil law, "*In communione vel societate nemo compellitur invitatus detineri*" (*d*).

The writ of partition was abolished by the 3 & 4 Will. 4, c. 27, s. 36; thus the Court of Chancery obtained exclusive jurisdiction over partitions.

In the exercise of its jurisdiction the Court of Chancery came to some curious conclusions. Thus, it held that the inconvenience

(*a*) Litt. 241; Flet. lib. 5, c. 9; Bract. lib. 2, c. 33; Brit. cc. 71, 72, 73; Co. Litt. 169a, n. (2), 187a; 2 Blackst. Comm. 185, 189, 194.

(*b*) Co. Litt. 164b, 187a.

(*c*) Note by Hargrave to Co. Litt. 169a (2).

(*d*) Cod., lib. 3, tit. 37, l. 5.

354 PARTITION ACT, 1868, AMENDMENT.

or difficulty in making a partition was no objection to a decree. In *Warner v. Baynes* (e), decided in 1750, a cold bath in Clerkenwell was ordered, by Lord Hardwicke, C., to be divided. In *Parker v. Baines*, decided in 1754, the plaintiffs and defendants were owners in fee simple of an undivided pasture, called "Thistleton Pasture," "the whole of which consisted of 102 acres of full-made beast grasses," which belonged to the plaintiffs and defendants in certain minute fractional proportions. The land extended a mile and a half. Some parts were poor land, rocky and craggy, while other parts were lower land of a much better description. In some of the proposed allotments there was no water at all. The defendants stated that "it would be most to the advantage of the property that it should remain undivided, as it had immemorially been;" "it would be very difficult, if not impracticable to make a fair division." Sir Thomas Clerke, M. R., nevertheless, directed a partition (f).

In *Turner v. Morgan* (g), decided in 1803, Lord Eldon, C., ordered a commission to issue for *dividing a house* in Portsmouth. The commissioners allotted to the plaintiff the entire stack of chimneys, all the fireplaces, the only staircase in the house, and all the conveniences in the yard. Lord Eldon, C., overruled an exception taken by the defendant to the manner in which the commissioners had executed the commission, saying that "he had granted the commission with great reluctance, but was bound by authority."

In *Griffiths v. Griffiths* (h), decided in 1863, Vice-Chancellor Kindersley directed a partition of a two-roomed cottage, in Cheshire, and about $4\frac{1}{2}$ acres of land, his Honor laying down the rule, that "where one tenant in common" (as was the case here) "refused to consent to a sale, he could insist on a partition."

The division in these cases was as little desirable as that of the living child in the "Judgment of Solomon."

The Legislature, accordingly, in 1868, applied a remedy.

(e) Ambler, 589.

(f) Ambler, 236.

(g) 8 Ves. 143.

(h) 11 W. R. (V. C. K.), 943.

The statute 31 & 32 Vict. c. 40, "an Act to amend the Law relation to Partition," was passed, receiving the Royal Assent on the 25th June, 1868. The act is as follows:—

"1. *Short Title.*—This act may be cited as the Partition Act, 1868.

"2. *As to the Term 'the Court.'*—In this act the term 'the Court' means the Court of Chancery in England the Court of Chancery in Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster, within their respective jurisdictions.

"3. *Power to Court to order Sale instead of Division.*—IN A SUIT FOR PARTITION, where, if this act had not been passed, a decree for partition might have been made, then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, if it thinks fit, ON THE REQUEST OF ANY OF THE PARTIES INTERESTED, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

"4. *Sale on Application of certain Proportion of Parties interested.*—In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

"5. *As to Purchase of Share of Party desiring Sale.*—In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the court to

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direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given, the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions.

"6. *Authority for Parties interested to bid.*—On any sale under this act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to nonpayment of deposit, or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same, or as to any other matters, as to the court seem reasonable.

"7. *Application of Trustee Act* (13 & 14 Vict. c. 60).—Sect. 30 of the Trustee Act, 1850, shall extend and apply to cases where, in suits for partition, the court directs a sale instead of a division of the property.

"8. *Application of Proceeds of Sale* (19 & 20 Vict. c. 120).—Sects. 23 to 25 (both inclusive) of the act of the session of the 19th and 20th years of her Majesty's reign (c. 120), 'to facilitate leases and sales of settled estates,' shall extend and apply to money to be received on any sale effected under the authority of this act.

"9. *Parties to Partition Suits.*—Any person who, if this act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; BUT ALL PERSONS WHO, IF THIS ACT HAD NOT BEEN PASSED, WOULD HAVE BEEN NECESSARY PARTIES TO THE SUIT,

SHALL BE SERVED WITH NOTICE OF THE DECREE OR ORDER ON THE HEARING, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by General Orders, apply to the court to add to the decree or order.

"10. *Costs in Partition Suits.*—In a suit for partition the court may make such order as it thinks just respecting costs up to the time of the hearing.

"11. *As to General Orders under this Act* (21 & 22 Vict. c. 27.)—Sects. 9, 10 and 11 of the Chancery Amendment Act, 1858, relative to the making of General Orders, shall have effect as if they were repeated in this act, and in terms made applicable to the purposes thereof.

"12. *Jurisdiction of County Courts in Partition* (28 & 29 Vict. c. 99).—In England the county courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this act) in any case where the property to which the suit relates does not exceed in value the sum of 500*l.*, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by sect. 1 of the County Courts Act, 1865."

Explanations of the provisions of "The Partition Act, 1868," will be found in 1 Daniell's Chancery Practice, pp. 1019—1033 (5th edition); 2 Dart's Vendors and Purchasers, pp. 1185—1189 (5th edition); Shelford's Real Property Acts, pp. 746—750 (8th edition); and in the notes to *Agar v. Fairfax*, 2 Tudor's Leading Cases in Equity, pp. 447—483 (4th edition).

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

The bill upon which this act is founded was introduced by Sir Henry Jackson, Q.C., and Mr. Marten, Q.C., into the House of

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Commons on the 15th February, 1876. The bill was read a second time, without discussion, on the 7th March, 1876, and on the next day was committed *pro formâ* for the purpose of inserting amendments. The amendments inserted were rather numerous, and for the purpose of showing their effect, the bill was reprinted "as amended in committee." On the 4th April, 1876, the bill as amended was considered in committee and reported without amendment. On the following day it was read a third time and passed, and it was sent up to the House of Lords on the 6th. On the 11th the bill was read a second time in the House of Lords, and on the 22nd it was considered in committee, and a number of important amendments were inserted in it at the instance of Lord Selborne. These amendments were reported on the 23rd, and the bill was read a third time in the House of Lords and passed on the 26th. Some further amendments were inserted on the third reading. The bill appears to have been subsequently still further amended in both Houses, during its passage to and fro between them, before receiving the Royal Assent. The Royal Assent was given to the bill on the 27th June, 1876, *which is the day on which it came into operation* (i).

SECTION 1.

Short Title.

This act may be cited as "The Partition Act, 1876," and shall be read as one with "The Partition Act, 1868."

By sect. 1 of the 31 & 32 Vict. c. 40, it is provided that that act may be cited as "The Partition Act, 1868."

It would have been convenient for reference if this section had provided that the two acts might be cited together as "The Partition Acts, 1868 and 1876."

The words "and shall be read as one with 'The Partition Act, 1868,'" were inserted in committee in the House of Commons.

(i) 33 Geo. III, c. 13; *Nares v. Rowles*, 14 East, 510.

SECTION 2.

Application of Act.

This act shall apply to actions pending at the time of the passing of this act as well as to actions commenced after the passing thereof, and the term "action" includes a suit, and the term "judgment" includes decree or order.

Compare as to "pending actions," sect. 22 of "The Supreme Court of Judicature Act, 1873." The words at the end of this section, "and the term 'judgment' includes decree or order," were inserted in committee in the House of Commons. By "The Supreme Court of Judicature Act, 1873," s. 100, it is provided that "'judgment' shall include 'decree,'" and that "suit" shall include "action." The provisions of that section apply to the Rules of Court in the first Schedule to "The Supreme Court of Judicature Act, 1875." (Ord. LXIII.) Suits in Chancery are now called "actions:" Supreme Court of Judicature Act, 1875, Order I., Rule 1.

SECTION 3.

Power to dispense with service of Notice of Decree or Order in special cases.

Where in an action for partition it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by "The Partition Act, 1868," required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof, may direct advertise-

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ments to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court (including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the court under "The Trustee Act, 1850," shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.

As the bill was originally framed there were two clauses (3 and 4) which occupied the place of this section:—

"3. *Court may direct a Sale though all Persons interested are not ascertained or not found.*—Where in an action for partition a sale might be directed if all the persons interested or presumptively interested had been originally parties to the action or had been served with notice of the decree or order, the court may, if it thinks fit, direct a sale of the property, and give all necessary consequential directions, although all the persons interested or presumptively interested in the property cannot or may not be ascertained or cannot or may not be found."

"4. *Power to dispense with service of Notice of Decree or Order in special cases.* See 31 & 32 Vict. c. 40, s. 9.—Where in an action for partition it appears to the court that

notice of the decree or order on the hearing of the cause cannot, without difficulty or expense disproportionate to the value of the property, be served on all the persons on whom that notice is by 'The Partition Act, 1868,' required to be served, or that any such person or persons cannot be ascertained, or cannot be found, or cannot, without difficulty or expense disproportionate to the value of the property or his share therein, be so ascertained or found, the court may, if it thinks fit, by the order for sale or any subsequent order, dispense with that service on any person or class of persons specified in the order."

In committee in the House of Commons these two clauses were omitted and the following clause was inserted instead:—

"**3.** *Power to dispense with Service of Notice of Decree or Order in special Cases.* See 31 & 32 Vict. c. 40, s. 9.—Where in an action for partition it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by 'The Partition Act, 1868,' required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and may also, if it thinks fit, by the same or any subsequent order, direct a sale of the property and give all necessary or proper consequential directions."

The bill was sent up to the House of Lords, so amended. Lord Selborne moved in committee in the House of Lords to leave out the words "and may also, if it thinks fit, by the same or any subsequent order," and to insert "and, instead thereof, may direct advertisements to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court

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(including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the court under 'The Trustee Act, 1850,' shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the court may thereupon, if it shall think fit."

Lord Selborne also moved the omission of clause 4 (originally clause 5) of the bill:—

"Effect of Order dispensing with Service.—Where an order is made under this act dispensing with service of a decree or order on any person either individually or as a member of a class specified in this order, and whether he is within or without the jurisdiction of the court, that person shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service he had been served with notice of the decree or order service whereof is dispensed with, and thereupon the powers of the court under 'The Trustee Act, 1850,' shall extend to his interests in the property to which the action relates as if he had been a party to the action."

The object of Lord Selborne's amendments was evidently to protect, as far as possible, the interests of absent persons from being injuriously affected by the judgment of the court. Lord Selborne's amendments were adopted by the House of Lords and by the promoters of the bill in the House of Commons, and form part of the present section.

The present section amends the 9th section of "The Partition Act, 1868," which, as we have seen, requires that "*all persons who, if this act had not passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been original parties to the suit.*"

As to what is a sufficient "service" of "necessary parties," the courts of equity have laid down no general rule. The cases in which the question has arisen have all been cases in which the "necessary party" was, for the time being, "*out of the jurisdiction.*" *Peters v. Bacon*, L. R., 8 Eq. 125; *Silver v.*

Udall, L. R., 9 Eq. 227; *Hurry v. Hurry*, L. R., 10 Eq. 346; *Teall v. Watts*, L. R., 11 Eq. 213.

In the case of *Hurry v. Hurry*, John Hurry, one of the "necessary parties," was believed to be in Australia, and it did not appear that any attempt had been made to serve him. His share was only one-ninth of one-fifth. Sir W. M. James, V. C., considered that John Hurry must be served, and that he could not order a sale in his absence. There was no suggestion in this case as to the mode of service.

In *Peters v. Bacon*, Lord Romilly, M. R., made a decree, ordering a sale, in the absence of some of the "necessary parties," who were believed to be resident in California; but he refused to allow the sale to proceed until notice of the decree had been given to the absent persons *by advertisement*. The method of giving notice suggested by the plaintiffs was "*by advertisement* in the *London Gazette* and in the *Times*, and in newspapers published in California, or elsewhere." Lord Romilly, however, directed that "it had better go to chambers for the chief clerk to settle the advertisements and the papers in which they" should "appear, and the number of times that they" should "appear."

In the case of *Silver v. Udall*, Sir W. M. James, V. C., decided that he had jurisdiction to order an immediate sale, in the absence, out of the jurisdiction, of "necessary parties," entitled to two-thirds of the property (i). This case was decided by Sir W. M. James, V. C., in December, 1869, and was not cited on the argument of *Hurry v. Hurry*, in May, 1870.

In *Teall v. Watts*, decided in January, 1871, Lord Romilly, M. R., followed the course pursued by himself in *Peters v. Bacon*, and by Sir W. M. James, V. C., in *Silver v. Udall*, by decreeing an immediate sale, in the absence of "necessary parties" out of the jurisdiction; but he doubted whether an advertisement would be sufficient notice of the decree, unless it could be "shown that the advertisement was brought to the knowledge of the party."

(i) The only reason why the V. C. refused to order an immediate sale was that it was doubtful where the "necessary parties" were.

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The present section clears up the doubt raised in *Teall v. Watts*, as to its being possible to give sufficient notice by advertisement, by enabling the court to dispense with service on "necessary parties" where it cannot be effected, or cannot be effected without expense disproportionate to the value of the property, and to direct instead, that advertisements shall be published calling upon the "necessary parties," who have not been served, to come in and establish their claims within a specified period. On this period elapsing, the "necessary parties" who shall not have come in and established their claims, are to be bound by the proceedings in the action as if they had been served with notice of the decree on the day of the date of the order dispensing with service.

The advertisements are to be published at such times and in such manner as the court shall think fit. No doubt the course pursued in *Peters v. Bacon* will be pursued, and "it will go to chambers for the chief clerk to settle the advertisements, and the papers in which they shall appear, and the number of times that they shall appear."

It will be perceived that the court can only dispense with service "on the request of" a "party interested in the property."

The section does not clear up the difficulty as to whether an order can, in the absence of "necessary parties," be made at the hearing (so called), or only "on further consideration." The latter would certainly seem to be the meaning of this rather obscure portion of the 9th section of "The Partition Act, 1868," and in *Buckingham v. Sellick* (k), this was the construction put upon it by Sir W. M. James, V. C. See also *Hurry v. Hurry* (l), where he expressed a similar view. See, *per contra*, his decision in *Silver v. Udall* (l). See also *Teall v. Watts* (l); *Peters v. Bacon* (l); *Lester v. Alexander* (m); and *Underwood v. Stewardson* (n).

(k) 22 L. T. (N. S.), 370.

(l) Cited *supra*.

(m) W. N. 1869, p. 75.

(n) 26 L. T. (N. S.) 688; 20 W. R. 668. See the note on p. 371.

SECTION 4.

Proceedings where Service is dispensed with.

Where an order is made under this act dispensing with service of notice on any person or class of persons, and property is sold by order of the court, the following provisions shall have effect:—

The object of the provisions which follow is to carefully protect the “necessary parties” in whose absence a sale is directed, against the forfeiture of their respective interests in the property ordered to be sold.

- (1.) The proceeds of sale shall be paid into court to abide the further order of the court:

This is the course which has been usually pursued where some of the “necessary parties” are under disability or resident out of the jurisdiction. See *Aston v. Meredith*, L. R., 11 Eq., 601; and L. R., 13 Eq., 492; and compare *Higgs v. Dorkis*, L. R., 13 Eq., 280.

- (2.) The court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time:
- (3.) The court shall direct such notices to be given by advertisements, or otherwise, as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made:

This seems to be merely a repetition of the principal clause of the section, and two-sets of notices by advertisement can hardly

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have been contemplated. This sub-section stood thus in the bill, as originally introduced:—

“(8.) The court shall direct such advertisements or notices to be given as it thinks best adapted for notifying to the persons on whom service is dispensed with the fact of the sale, and the time of the intended distribution.”

It was amended in committee in the House of Commons, and then stood thus:—

“(8.) The court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to the persons on whom service is dispensed with the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made.”

In committee in the House of Lords Lord Selborne moved to leave out the word “the” before “persons” and to insert “any” instead, and after “with” to insert “who may not have previously come in and established their claims.”

These amendments of Lord Selborne were accepted.

- (4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons:

This sub-section originally stood thus:—

“(4.) At the expiration of the time so fixed or extended, the court shall distribute the proceeds in accordance with the rights of the persons interested therein, in the same manner as if the parties not served had been actually served.”

In committee on the bill in the House of Commons, the sub-section was recast and assumed its present form, and sub-section (5) was added. As originally framed, the bill dealt with the interests of absent “necessary parties” in a much more drastic manner than in its amended form.

- (5.) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the court that they cannot be

ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in such manner as appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and with such reservations (if any) as to the court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any *prima facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

This sub-section very jealously guards the rights of absent "necessary parties." It was not in the bill as originally introduced, but was inserted in committee in the House of Commons, with the exception of the words, "and with such reservations (if any), as to the court may seem fit, in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any *prima facie* rights which ought to be so provided for, although such rights may not have been fully established." These words were inserted in committee on the bill in the House of Lords on the motion of Lord Selborne (o).

(o) The following clause, which appeared in the bill as originally introduced, and which followed on here, was omitted

SECTION 5.

Provision for Case of Succesive Sales in the same Action.

Where in an action for partition two or more sales are made, if any person who has by virtue of this act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale, if his claim thereto had been established in due time.

This section was not in the bill as originally introduced. It was added in committee in the House of Commons. It appears to have been framed on the analogy of the equitable doctrine of marshalling assets (*p*); that is to say, when a person has two funds to satisfy his demands, he shall not disappoint a person who has only one.

in committee in the House of Commons:—"In the distribution due reservation shall be made of the shares of absent or unascertained persons, and every person bound by the proceedings in the action shall have, in respect of the proceeds of sale, a share, interest, or right corresponding to his share, interest, or right in the property sold, and the proceeds of sale shall, for the purposes of division and distribution, be in substitution for the property sold."

(*p*) See note to *Aldrich v. Cooper*, 1 Tudor's Leading Cases in Equity, 78, 4th ed.

SECTION 6.

Request by Married Woman, Infant or Person under Disability.

In an action for partition a request for sale may be made, or an undertaking to purchase given, on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit.

The words "person of unsound mind" and "committee in lunacy (if so authorized by order in lunacy)," were not in the bill as originally introduced, but were added in committee in the House of Commons: "or an undertaking to purchase given" and "or purchase" were added at the same time.

The words "a request for sale" in this section refer to the words "on the request of any of the parties interested" in sect. 3 of "The Partition Act, 1868." Prior to the present enactment it was held in *Higgs v. Dorkis* (q) by Sir John Wickens, V. C., that the court might order a sale instead of a partition on the request of a *feme covert*, although the effect of the sale would be to convert her inheritance in a copyhold estate, which her husband could not touch, into money which he could touch. This decision appears to have been made on the authority of *France v. France* (r), in which the same learned judge held that the court might order a sale, instead of a partition, at the request of an *infant*. *France v. France* was, again, decided on the authority of the unreported case of *Young v. Young* (s), in

(q) L. R., 13 Eq. 280.

(r) L. R., 13 Eq. 173, decided in 1871.

(s) See L. R., 13 Eq. 175, n. (1), decided in 1870.

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which Sir R. Malins, V. C., said, that notwithstanding that he felt a difficulty in ordering a sale, instead of a partition, at the request of an infant, as it might cause a difficulty in regard to the title, he would nevertheless make the order. The conveying counsel considered that a good title could, in *Young v. Young*, be made, and no objection was taken to it.

Sir John Wickens, V. C., followed the precedent of *Young v. Young*, in *Davey v. Wistlisbach* (t), decided a year later than *France v. France*. On the other hand, the Court of Appeal in Chancery decided, very recently, that Sir J. Stuart, V. C., was wrong in ordering a sale instead of a partition, on the request of a person of unsound mind, suing by her next friend (u).

The present section will set at rest all technical difficulties as to the capacity of persons under disability to request a sale, instead of a partition.

SECTION 7.

Action for Partition to include Action for Sale and Distribution of the Proceeds.

For the purposes of "The Partition Act, 1868," and of this act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

Sections 3, 4 and 5 of "The Partition Act, 1868," only enable the court to decree a sale in a suit for partition, where, if that act had not been passed, a decree for partition would have been made. In a bill, therefore, *for a sale* of property under the act, it was necessary to *pray for a partition* as well as a sale (x).

In *Teall v. Watts* (y), the bill prayed for a sale only, and not

(t) L. R., 15 Eq., 269, decided in 1872.

(u) *Halfhide v. Robinson*, L. R., 9 Ch. App., 373, decided in 1874.

(x) See Shelford's R. P. Stats. 746, 8th ed. and Tudor's L. C. in Eq., 479, 4th ed.

(y) L. R., 11 Eq., 213.

for a partition; but at the instance of the plaintiff, Lord Romilly, M. R., directed the "prayer" to be "amended," so as to give the court jurisdiction under "The Partition Act, 1868," s. 3.

In *Holland v. Holland* (z), Sir John Wickens, V. C., directed the "prayer" to be similarly amended.

In *Aston v. Meredith* (a), however, which Mr. Crossley, counsel for the plaintiff in *Holland v. Holland*, in support of his view that it was unnecessary to pray, in the alternative, for a partition, cited, Sir James Bacon, V. C., decreed a sale, although the bill did not pray, in the alternative, for a partition.

The present section sets this question at rest by declaring, that in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

(z) L. R., 13 Eq. 406.

(a) L. R., 11 Eq. 601.

N.B.—Mr. Marten, Q.C., who, with Sir H. Jackson, Q.C., had charge of the bill on which this act was founded, has favoured the writer with the following note as to the construction of an obscure part of the ninth section of the principal act (see p. 364, *supra*):—

"1. If 'at the hearing' it is *proved* that all persons interested are parties or are bound, an *immediate order* may be made for sale.

"2. If 'at the hearing' it is *suggested* that all persons interested are parties or are bound, then it may be ordered at the hearing that *an inquiry* be made who are interested; and if it appear that all persons interested are parties or are bound, that a sale be made.

"3. In other cases the sale can only be ordered, 'on *further consideration*,' after all persons interested are served or are bound."

VII. SETTLED ESTATES ACT (1856) AMENDMENT.

39 & 40 VICT. c. 30.

AN ACT TO AMEND THE SETTLED ESTATES ACT OF 1856.

THIS act, which is due to Mr. Alfred George Marten, Q.C., one of the members for the borough of Cambridge, has for its object the further amendment of "The Leases and Sales of Settled Estates Act, 1856." That act had been previously amended by the statutes 21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45, and 37 & 38 Vict. c. 33.

The stat. 37 & 38 Vict. c. 33, is included in the present work (a).

The bill, upon which this act is founded, was introduced into the House of Commons on the 14th of June, 1876, by Mr. Marten, Q.C., Sir Henry Jackson, Q.C., and Mr. Gregory. It was read a second time, without discussion, on the 22nd of June, considered in committee and reported without amendment on the 26th of June, and read a third time on the following day. On the 29th of June the bill was read a first time in the House of Lords, and on the 10th of July it was read a second time there without discussion. On the 14th of July the bill was considered in committee in the House of Lords, and reported without amendment, and on the 17th of July it was read a third time. On the following day a message was sent to the House of Commons, announcing the agreement of the House of Lords to the bill, without amendment. On the 24th of July the bill received the Royal Assent. The day of the passing of the bill is the date, also, of its commencement (b).

(a) See p. 1, *supra*.

(b) *Nares v. Rowles*, 14 East, 510; 33 Geo. 3, c. 13.

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Whereas by section fourteen of "The Settled Estates Act of 1856" (nineteenth and twentieth Victoria, chapter one hundred and twenty), herein called the principal Act, it is enacted that it shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the principal Act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens or other open spaces, sewers, drains or watercourses, either to be dedicated to the public or not:

And whereas difficulty in the exercise of the said power has arisen for want of sufficient power to direct the said streets and other works to be made and executed, and to provide for the expenses incurred in relation thereto, and it is expedient to amend the principal Act accordingly:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

The present enactment was passed to remove the "difficulty" raised *In re Venour's Settled Estates* (*Venour v. Sellon*) (c), by Sir George Jessel, M. R., and as that case was decided on the 29th of April, 1876, and the present enactment received the Royal Assent on the 24th of July, 1876, seldom has a legal "difficulty," arising from judge-made law, been more speedily remedied.

In the case of *Venour's Settled Estates*, part of the settled

real estate consisted of a piece of land at Mile End, London, containing 2A. 2R. 4P., which was entirely vacant and unoccupied, but was well adapted for building purposes. In order, however, that it might be built upon to the greatest advantage, *it was necessary that a considerable sum should be expended in constructing roads and drains.* The real estate stood limited under the marriage settlement of Mr. and Mrs. Venour, dated 30th June, 1852, to the use of Mrs. Venour (who had survived her husband) during her life, with remainder, as to one moiety, to such uses as she should by deed or will appoint, and as to the other moiety and also as to the first-mentioned moiety in default of appointment, to the use of the children of the marriage, as tenants in common, in equal shares, with cross remainders between them in the event of any child dying under twenty-one without leaving issue. Under the same settlement a sum of 4,780*l.* 13*s.* 8*d.* consols was held upon trusts corresponding with the limitations of the real estate; and there was power to invest this fund in the purchase of land. There were five children of the marriage, of whom one, John Hamilton Venour, had attained twenty-one. Two had died under twenty-one without issue, and two were still living, but were infants.

Mrs. Venour, the tenant for life, and her son, John Hamilton Venour, one of the remaindermen, presented a petition under the Leases and Sales of Settled Estates Acts, asking the Master of the Rolls to *direct* first, that roads and drains should be constructed on the piece of land at Mile End; secondly, that so much of the consols as might be necessary for defraying the expense of constructing the roads and drains (not exceeding, in the whole, 1,500*l.*), *should be sold and applied* in defraying such expense. The Master of the Rolls decided that he had no power to make either direction. First, he could not direct the roads and sewers to be made. "The 14th section of 'The Leases and Sales of Settled Estates Act, 1854,'" said the Master of the Rolls, "does not say that the court may direct roads and sewers to be made, but that the court may direct any part of the estate 'to be laid out' for roads and sewers. Those words do not mean that the court may order the roads and sewers to be made, but merely that *the building plans sanctioned by the court may*

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include the construction of roads and sewers. This view is borne out by the marginal note, 'Court may *authorize* dedication of parts of settled estates for roads, &c.'" (d).

Secondly, the Master of the Rolls had no power to order that the consols should be sold and applied in defraying the expenses of the (proposed) roads and drains. On this point Sir George Jessel considered that he was bound by express authority. The three cases by which he considered himself bound were, *In re Chambers* (e), decided by Lord Romilly, M. R., in 1860; *Re Hurles' Settled Estates* (f), decided by Lord Hatherley, when V. C., in 1864; and *Drake v. Trefusis* (g), decided by James and Mellish, L.JJ., in 1875. In the cases of *In re Chambers* and *Re Hurles' Settled Estates* the Court of Chancery was asked to direct the sale of a portion of the settled freehold land and the application of the sale moneys to defraying the expense of constructing roads and sewers on another portion of the same land, and it was held that the court had no power to give such a direction. In *Drake v. Trefusis*, the Court of Chancery was asked to direct that moneys arising from the sale of a portion of settled real estate should be applied towards "permanently improving farm houses, homesteads, farm buildings and cottages" on the unsold parts of the settled real estate. It was held that the court had no power to give the direction.

The authorities on the other side were an unreported decision of Vice-Chancellor Stuart, *Re Gilbert* (h), on all fours with the present case; and *In re Newman's Settled Estates*, decided by James and Mellish, L.JJ., in 1874, when a very small

(d) Sir George Jessel proceeded to say that "the marginal notes of acts of parliament form part of the acts." It is submitted that this is incorrect. It would, also, be attended with very serious consequences, as the marginal notes are frequently added by clerks in the House of Lords, and often remain unaltered, after the clauses to which they relate have been amended.

(e) 28 Beav., 653.

(f) 2 Hem. & Mil., 196.

(g) L. R., 10 Ch. App., 364.

(h) 15th November, 1862; Reg. Lib. 1862, A., 2482, cited 2 Hem. & Mil., 199.

sum (i) arising from the sale of timber on the settled real estate was applied to defraying the expense of executing some drainage work on the same estate. The decision of Sir George Jessel, M. R., in the case of *Venour's Settled Estates*, virtually overruled the last-mentioned decisions.

SECTION 1.

Making and executing, and Expenses of laying out and making and executing Streets, Roads, and other Works.

Where under section fourteen of the principal Act any part of any settled estates is directed to be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not, the court may direct that any such streets, roads, paths, squares, gardens, or other spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connections, and other works incidental thereto respectively, BE MADE AND EXECUTED, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of A SALE or mortgage of, or charge upon all or any part of the settled estate, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates.

It will be perceived that this section naturally divides itself into two parts, answering to the two parts of the second recital of the preamble. First, the section provides a remedy for the "difficulty" that "has arisen for want of sufficient power to

(i) 15L. 7s. 8d. The reasons given for the decision in that case do not, however, apply to this minute point.

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direct the works to be made and executed;" and secondly, the "difficulty" that "has arisen for want of sufficient power to provide for the expenses incurred in relation thereto."

To sanction a proposal by the petitioner to make roads and drains, and to order that roads and drains shall be made, are evidently distinct things; and yet there can be little doubt that the former power was *meant* by the Parliament of 1856 to include the latter. The present enactment will enable the court to give full effect to the meaning of the authors of the principal Act. As regards the second part of the present section, it will confer on the court a power, to a great extent (*h*) new, of defraying the expenses of constructing roads and drains, &c. out of the property in settlement. It is understood that there are many settled estates which will be benefited largely by this new method of providing out of these estates themselves for the cost of the improvements specified in sect. 14 of "The Leases and Sales of Settled Estates Act, 1856."

SECTION 2.

Short Title and Construction.

This act may be cited as "The Settled Estates Act, 1876," and shall be construed as one with the principal Act.

There is no short title of the principal Act, but it is usually known as "*The Leases and Sales of Settled Estates Act, 1856.*"

"This act shall be construed as one with the principal Act." The power to direct the construction of roads, &c., is thus incorporated with sect. 14 of the principal Act; the power to direct the application of sale-money to defraying the expenses is (virtually) incorporated with sect. 23 of the principal Act.

(*h*) In *Venour's Settled Estates* the Master of the Rolls allowed part of the consols to be sold and the proceeds to be advanced on MORTGAGE by the petitioners of their interests in the settled real estate, for the purpose of constructing the roads and drains.

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THE END.

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THE
REAL PROPERTY ACTS,
1877

(40 & 41 Vict. cc. 18, 33, 34),

*Settled Estates Act, Contingent Remainders Act, and
Exoneration of Charges Act,*

TO WHICH ARE ADDED

THE NEW ORDERS UNDER THE SETTLED ESTATES ACT, 1877:

With Explanatory Notes.

BEING A

SUPPLEMENT

TO THE THIRD EDITION OF

THE REAL PROPERTY ACTS, 1874, 1875, 1876.

BY

WILLIAM THOMAS CHARLEY, D.C.L., M.P.

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P R E F A C E.

PRIOR to preparing the notes to the Settled Estates Act, 1877, for the press, I had the advantage and satisfaction of going through the Act, section by section, in consultation with its learned Author, Mr. Marten, Q.C. I have included in the notes his explanations of its provisions. The notes were in type a year ago, and would have then been published if the new Orders under the Act had been issued in due course: An unprecedented delay has occurred in the issuing of the new Orders, attributable, I believe, to some extent, to the completeness of the Act itself. The publication of the notes to the Act has been, from time to time, put off to await the appearance of the new Orders in an authorized form.

Through the kindness of Mr. Pemberton, the Official Solicitor to the Supreme Court, I was furnished with an annotated draft of the new Orders, before they were formally promulgated. I have

availed myself of the useful explanatory remarks appended to this draft in preparing the notes to the Act.

The decided cases have been brought down to the time of going to press.

The Act is an admirable piece of mosaic. In the notes the new matter incorporated at different stages in the Act is printed in small capitals, so that the reader will be able to distinguish at a glance the new matter from the old.

I have not presumed to re-write Mr. Shelford's Commentaries on the Settled Estates Acts of 1856, 1858 and 1864; but I have appended the necessary references to the last edition of his work, or to the cases cited by him, in footnotes.

In the notes to the Contingent Remainders Act, 1877, I have set out the controversy between Mr. Joshua Williams, Q.C., and Mr. George Sweet, in their own words.

The notes to the Exoneration of Charges Act, 1877, contain a brief *résumé* of the previous enactments on the same subject, and of the causes which led to them.

I have added a very full Index, which is, to some extent, an analysis of the new Acts.

It may not be considered out of place if I call the attention of the reader to the fact that one of the Real Property Acts which I have already annotated—the “Real Property Limitation Act, 1874” (*a*), comes in force to-day, the 1st of January, 1879. The cause of postponing for nearly five years the commencement of that Act will be found explained in the third edition of the “Real Property Acts, 1874, 1875, 1876 (*b*),” to which the present work is a supplement.

W. T. C.

5, CROWN OFFICE ROW, TEMPLE,
January 1st, 1879.

(*a*) 37 & 38 Vict. c. 57, s. 12.

(*b*) At page 64.

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VIII.

THE SETTLED ESTATES ACT, 1877.

40 & 41 VICT. c. 18.

An Act to consolidate and amend the Law relating to Leases and Sales of Settled Estates.

[28th June, 1877.]

Whereas it is expedient TO CONSOLIDATE AND AMEND THE LAW RELATING TO LEASES AND SALES OF SETTLED ESTATES :

The statute law, relating to leases and sales of settled estates, will be found in the five Acts specified in the Schedule to this Act, which are entirely repealed by sect. 58 of this Act, *infra*, but are re-enacted, with amendments, by this Act in a consolidated form.

The preamble is much more concise than that of the Principal Act. The words in small capitals are new.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows :

This measure was introduced into the House of Commons by Mr. Alfred Marten, Q.C., Sir Henry Jackson, Q.C., and Mr. George Gregory (Gregory, Rowcliffes & Rawle), on the 9th of February, 1877—the first available day of the session

for the introduction of bills. It was read a second time on the 27th of February, and passed through committee on the 14th of March. It was amended in committee by the Right Hon. Hugh Law, ex-Attorney-General for Ireland, by Mr. Granville Ryder, and by Mr. Marten, Q.C. The bill was considered, as amended, on the 12th of April, when three entirely new clauses were added, two by Mr. Meldon, and one by Mr. Marten, Q.C. On the 13th of April, Sir Robert Peel moved that the bill be re-committed, with a view to the insertion by him of new clauses, and the bill was re-committed accordingly. Sir Robert Peel's new clauses were before the committee on the 16th of April. Sir Henry James, Q.C., ex-Attorney-General for England, objected to them, and they were negatived. On the 19th of April the bill was read a third time.

In the House of Lords the bill was read a first time on the 23rd of April, and a second time on the 1st of May. It went into committee on the 15th of May, and was amended by Lord Cairns, C. The amendments were reported on the 4th of June. The bill was again amended and passed the third reading on the 14th of June. On the 21st of June the Commons agreed to the Lords' amendments. On the 28th of June the bill received the Royal Assent.

By the 17th of the new Orders under this Act, "Upon every petition evidence shall be produced to satisfy the Court that neither the applicant nor any party entitled has previously applied to either House of Parliament for a Private Act to effect the same or a similar object, or if any such application has been made that the same was not rejected on its merits or reported against by the judges to whom the bill may have been referred."

By the 26th of the new Orders under this Act, "The Rules 1, 2, 3, and 6 of Order LVII. (as to time) in the Schedule to the Supreme Court of Judicature Act, 1875, shall be applicable to these Orders, and to all proceedings under the Act" (a).

(a) See Charley's Judicature Acts, 3rd ed., pp. 733, 734.

SECTION 1.

Short title.

This Act may be cited for all purposes as "The Settled Estates Act, 1877."

There was unfortunately no "short title" to the Principal Act. The Amending Acts of 1858 and 1864 were equally without "short titles." The Amending Act of 1874 was known as "The Leases and Sales of Settled Estates Amendment Act, 1874," which can hardly be considered as a "short title." The "short title" of the Amending Act of 1876 was "The Settled Estates Act, 1876." The new Orders under this Act may be cited as "The Settled Estates Act Orders, 1877" (Order 34).

SECTION 2.

Interpretation of "settlement" and "settled estates" (b).

The word "settlement" as used in this Act shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stands limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively.

The term "settled estates" as used in this Act shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement; and for the purposes of this Act a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life.

(b) The words "settlement" and "settled estates" have the same interpretation in the new Orders as in this Act (Rule 1).

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement (*a*).

In determining what are settled estates within the meaning of this Act, the Court shall be governed by the state of facts, and by the trusts or limitations of the settlement, at the time of the said settlement taking effect (*b*).

The first and second clauses of this section are copied *verbatim* from the Principal Act (19 & 20 Vict. c. 120), sect. 1. The third clause is copied *verbatim* from the Amending Act of 1858 (21 & 22 Vict. c. 77), sect. 1. The fourth clause is copied *verbatim* from the Amending Act of 1864 (27 & 28 Vict. c. 45), sect. 3.

SECTION 3.

Interpretation of "the Court" (c).

THE EXPRESSION "THE COURT" IN THIS ACT SHALL, SO FAR AS RELATES TO ESTATES IN ENGLAND, MEAN THE HIGH COURT OF JUSTICE, AND ALL CAUSES AND MATTERS IN RESPECT OF SUCH ESTATES COMMENCED OR CONTINUED UNDER THIS ACT SHALL, SUBJECT TO THE PROVISIONS OF THE JUDICATURE ACTS (*d*), BE ASSIGNED TO THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE IN LIKE MANNER AS IF SUCH CAUSES AND MATTERS HAD ARISEN UNDER AN ACT OF PARLIAMENT BY WHICH, PRIOR TO THE PASSING OF THE JUDICATURE ACTS (*d*), EX-

(*a*) See the cases on these two clauses collected in Shelford's R. P. Acts, 686, 687 (8th ed., by Carson).

(*b*) As distinguished from the state of facts at the time of an application to the Court. See *Re Goodwin*, 3 Giff., 620.

(*c*) The words "the Court" have the same interpretation in the new Orders as in this Act (Rule 1).

(*d*) This appears to be a slip for "Supreme Court of Judicature Acts," the legal "Short Title."

CLUSIVE JURISDICTION IN RESPECT TO SUCH CAUSES AND MATTERS HAD BEEN GIVEN TO THE COURT OF CHANCERY, OR TO ANY JUDGES OR JUDGE (e) THEREOF RESPECTIVELY.

THE EXPRESSION "THE COURT" IN THIS ACT SHALL, SO FAR AS RELATES TO ESTATES IN IRELAND, MEAN THE COURT OF CHANCERY IN IRELAND (f).

This section is new. The expressions used in the Principal Act are, "The Court of Chancery in England, so far as relates to estates in England;" and, "The Court of Chancery in Ireland, so far as relates to estates in Ireland." By sect. 34 of The Supreme Court of Judicature Act, 1873, it is provided that "there shall be assigned (subject as therein mentioned) to the Chancery Division of the" [High] "Court all causes and matters to be commenced after the commencement" of that "Act, under any Act of Parliament by which exclusive jurisdiction, in respect of such causes and matters, has been given to the Court of Chancery, or to any judges or judge thereof respectively." That section is, by the present section, to include causes and matters relating to estates in England commenced or continued under this Act.

SECTION 4.

Power to authorize leases of settled estates.

It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained (g), to authorize leases of

(e) The words "the Judge" in the new Orders mean the Judge of the Court with whose name the petition is marked or to whom the petition is transferred (Rule 1).

(f) The Chancery Division of the High Court of Justice in Ireland (40 & 41 Vict. c. 57, ss. 5 and 34).

(g) See *Taylor v. Taylor*, *Taylor v. Keily*, *Ex parte Taylor*, 1 Ch. D., 426; 45 L. J. (Ch.), 373, cited under sect. 23, *infra*.

any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:—

First. Every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so FAR AS RELATES TO ESTATES IN ENGLAND twenty-one years, OR SO FAR AS RELATES TO ESTATES IN IRELAND THIRTY-FIVE YEARS, and for a mining lease or a lease of (h) water mills, way leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the Court shall direct, where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term herein-before specified in that behalf:

Secondly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half yearly or oftener without taking any fine or other benefit in the nature of a fine: PROVIDED ALWAYS, THAT IN THE CASE OF A MINING LEASE, A REPAIRING LEASE, OR A BUILDING LEASE, A PEPPERCORN RENT OR ANY SMALLER RENT THAN THE RENT TO BE ULTIMATELY

(h) The word "water" is here omitted.

MADE PAYABLE MAY, IF THE COURT SHALL THINK FIT SO TO DIRECT, BE MADE PAYABLE DURING ALL OR ANY PART OF THE FIRST FIVE YEARS OF THE TERM OF THE LEASE :

Thirdly. Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient:

Fourthly. No such lease shall authorize the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease:

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof (*i*), and every such lease shall contain a condition for re-entry on nonpayment of the rent for a period of twenty-eight days AFTER IT BECOMES DUE OR FOR SOME LESS PERIOD TO BE SPECIFIED IN THAT BEHALF (*k*).

(*i*) This word was inserted in Committee in the House of Commons by Mr. Marten, Q.C. It was not in the bill as originally framed.

(*k*) See, as to this section, Woodfall's Landlord and Tenant 11th ed., by Lely, 31.

This section is mainly copied from sect. 2 of the Principal Act (l). The words "and for a repairing lease sixty years," in the first paragraph, are, however, taken from sect. 2 of the Amending Act of 1858; and the proviso, at the end of that paragraph, is taken from sect. 4 of the same Act. The new power to grant leases, so far as relates to estates in Ireland, for thirty-five years instead of twenty-one years, was (by analogy to sect. 28 of the Landlord and Tenant (Ireland) Act, 1870) inserted by Mr. Meldon, on the report of the bill in the House of Commons (m). The proviso at the end of the second paragraph, and the words at the end of the fifth paragraph, "or for some less period to be specified in that behalf," are new provisions originally contained in the bill. The proviso at the end of the second paragraph was inserted in consequence of the decision of the Court of Appeal in Chancery in *Cust v. Middleton* (n). In that case, the Lords Justices (o) held that it was necessary to apply to parliament for a private Act to empower the trustees of settled estates to grant leases of some of the houses at a peppercorn rent, or at any rent other than the "best." It was not sufficient to satisfy the terms of the 2nd section of the Principal Act, that the leases of the houses, taken as a whole, should be at the best rent. Each lease, taken separately, must be at the best rent. This is remedied by the proviso to the second paragraph of this section.

In the fifth condition, the words "of twenty-eight days after it becomes due, or for some less period to be specified in that behalf," have been substituted for "not less than twenty-eight days after it becomes due," thus enabling the lessor to stipulate for a right of re-entry on nonpayment of rent for a period less than twenty-eight days after it has become due.

By Order 25 of the new Orders, "In cases where the Court authorizes a lease the Order shall direct that the lease shall contain such conditions as are required by the Act, and such other covenants, conditions, and stipulations as the Court shall

(l) See the cases on that section collected in Shelford's R. P. Acts, 688 (8th ed., by Carson).

(m) See the note to ss. 46 and 59, *infra*. The words were copied from one of Mr. Law's amendments to that section.

(n) 3 De Gex, F. & J., 33; 7 Jur., N. S., 151.

(o) Knight-Bruce and Turner, L.JJ.

deem expedient with reference to the special circumstances, or may direct the same to contain such covenants, conditions, and stipulations as may be approved by the Judge at chambers without directing the lease to be settled by the Judge."

SECTION 5.

Leases may contain special covenants.

Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions and stipulations as the Court shall deem expedient with reference to the special circumstances of the demise.

This section is copied *verbatim* from sect. 3 of the Principal Act.

SECTION 6.

Parts of settled estates may be leased.

The power to authorize leases conferred by this Act shall extend to authorize leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

This section is copied *verbatim* from sect. 4 of the Principal Act.

SECTION 7.

Leases may be surrendered and renewed.

Any leases, whether granted in pursuance of this Act or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same

or not, and the power to authorize leases conferred by this Act shall extend to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease (*p*).

This section is taken from the 5th section of the Principal Act, as extended by the 5th section of the Amending Act of 1858 to all leases whether granted in pursuance of the Principal Act or otherwise.

SECTION 8.

Power to authorize leases to extend to preliminary contracts.

The power to authorize leases conferred by this Act shall extend to authorize preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases.

This section is copied *verbatim* from sect. 6 of the Principal Act.

SECTION 9.

Powers of leasing to include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

All the powers to authorize and to grant leases contained in this Act shall be deemed to include RESPECTIVELY POWERS TO AUTHORIZE THE LORDS OF SETTLED MANORS, AND powers to the lords of settled manors, to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorized

(*p*) See *Re Rawlins*, L. R., 1 Eq., 286; *Re Ford*, L. R., 8 Eq., 309.

or granted of freehold hereditaments under this Act.

This section is taken from sect. 3 of the Amending Act of 1858, with the addition of the words in small capitals, which were added, on the motion of Mr. Marten, in committee on the bill in the House of Commons. The enactment from which the section is taken was evidently defective in not containing these words. *Reddendo singula singulis*, the present section will read thus:—"All the powers to *authorize* leases, contained in this Act, shall be deemed to include powers to authorize the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors, to the same extent and for the same purposes as leases may be authorized of freehold hereditaments under this Act. All the powers to *grant* leases contained in this Act shall be deemed to include powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors, to the same extent and for the same purposes as leases may be granted of freehold hereditaments under this Act." The powers to authorize the lords of settled manors to give licences are exerciseable by the Court; the powers to the lords of settled manors to give licences are exerciseable by the lords of settled manors themselves. While the earlier part of the section spoke of a power to "*authorize*" the giving leases of freeholds, as well as of a power to "*grant*" leases of freeholds, the latter part of the section provided only for a power to give licences to grant leases of copyholds, and contained no provision for a power to *authorize* the giving licences to grant leases of copyholds. It was a *casus omissus*, and the omission has now been supplied.

SECTION 10.

Mode in which leases may be authorized.

The power to authorize leases conferred by this Act may be exercised by the Court either by

approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner hereinafter mentioned.

This section is copied *verbatim* from sect. 7 of the Principal Act.

“Hereinafter mentioned,” *i.e.*, in sect. 13, *infra*.

SECTION 11.

What evidence to be produced on an application to authorize leases.

When application is made to the Court either to approve of a particular lease or to vest any powers of leasing in trustees, the Court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized.

This section is copied *verbatim* from sect. 8 of the Principal Act.

SECTION 12.

After approval of a lease, Court to direct who shall be the lessor.

When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled

the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.

This section is copied *verbatim* from sect. 9 of the Principal Act.

SECTION 13.

Powers of leasing may be vested in trustees.

Where the Court shall deem it expedient that any general powers of leasing any settled estates conformably to this Act should be vested in trustees, it may by order vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the Court may also authorize the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid.

This section is copied *verbatim* from sect. 10 of the Principal Act (q).

Powers of granting mining leases were ordered by Vice-Chancellor Malins to be vested in the trustees of a will, under

(q) See the cases on that section collected in Shelford's R. P. Acts, 690 (8th ed., by Carson), and *Re Sheffield*, W. N., 1876, p. 152.

which two contiguous estates were demised to them upon trust for two distinct sets of *cestuis que trustent*. Vice-Chancellor Hall refused to enforce specific performance of an agreement by the trustees to demise the two estates by one lease at the entire rent, with one shaft for working the minerals under both estates, and one set of royalties; and the Court of Appeal unanimously affirmed the decision (r). "It may well be," said Vice-Chancellor Hall, "that the mineral under the one estate is worth more than that under the other; but in this lease it is all lumped together as one property." "If a lease," said Lord Justice James, "under two separate trust estates can be granted, one does not see why a lease under three, four or five separate estates could not be granted in the same way."

SECTION 14.

Conditions that leases be settled by the Court not to be inserted in orders made under this Act.

PROVIDED ALWAYS, THAT in orders under THIS ACT for vesting any powers of leasing in any trustees or other persons, no CONDITIONS shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the Court or a Judge thereof, or be made conformable with a model lease deposited in the Judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient.

This section is copied *verbatim* from sect. 1 of the Amending Act of 1864 (27 & 28 Vict. c. 45), with the addition of the words "provided always that," at the commencement of the section, and the substitution of "this Act" for "the said tenth

(r) *Tolson v. Sheard*, 5 Ch. D., 19; 36 L. T., 756.

section" (*i. e.* sect. 10 of the Principal Act, which is now sect. 13 of this Act), and of "conditions" for "condition."

SECTION 15.

Conditions where inserted may be struck out.

PROVIDED ALSO, THAT in all cases of orders (WHETHER UNDER THIS ACT OR UNDER THE CORRESPONDING ENACTMENT OF THE ACTS HEREBY REPEALED) in which any such condition as LAST aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the Court to alter and amend such order by striking out such condition, and the Court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the Court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the Court that there is any special reason why in the case in question such a condition is necessary or expedient.

This section is taken (with the addition of the words "provided also, that" at the commencement of the section, of the words in brackets, and of the word "last") from sect. 2 of the Amending Act of 1864 (*s*).

The effect of the words in small capitals between the brackets is to extend the provisions of sect. 2 of the Amending Act of 1864 to the case of orders made subsequently to that Act. The section, as it stood in the Amending Act of 1864, commenced thus:—"In all cases of orders *already made* under the said tenth section" (*i. e.* under sect. 10 of the Principal Act, which is now sect. 13 of this Act).

(*s*) See *Re Hoyle*, 12 W. R., 1125, and *Re Dorning*, 14 W. R., 125.

SECTION 16.

Court may authorize sales of settled estates and of timber.

It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained (*t*), from time to time to authorize a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates; and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.

This section is copied *verbatim* from sect. 11 of the Principal Act (*u*), the words "of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland," being omitted after the words "lawful for the Court" as no longer necessary on account of sect. 3 of this Act, *supra*.

The Court may, under this section, sanction a sale generally. *Re Andrews*, 38 L. T., 877; 26 W. R., 811. Compare *Re Peacock*, 15 W. R., 100.

SECTION 17.

Proceedings for protection.

~~IT SHALL BE LAWFUL FOR THE COURT, IF IT SHALL DEEM IT PROPER AND CONSISTENT WITH A DUE REGARD FOR THE INTERESTS OF ALL PARTIES WHO ARE OR MAY HEREAFTER BE ENTITLED UNDER THE SETTLEMENT, AND SUBJECT TO THE PROVISIONS~~

(*t*) See *Taylor v. Taylor*; *Taylor v. Keily*; *Ex parte Taylor*, 1 Ch. D., 426; 45 L. J. (Ch.), 373, cited under sect. 23, *infra*.

(*u*) See the cases on that section collected in Shelford's R. P. Acts, 691 (8th ed., by Carson), and *Re Adams*, 9 Ch. D., 116; 27 W. R., 110; 38 L. J., 877.

*Sect 17 repealed by "Settled Land Act 1925"
(44 & 45 Vict. Cap 38)*

~~AND RESTRICTIONS IN THIS ACT CONTAINED, TO
SANCTION ANY ACTION, DEFENCE, PETITION TO PAR-
LIAMENT, PARLIAMENTARY OPPOSITION, OR OTHER
PROCEEDINGS APPEARING TO THE COURT NECESSARY
FOR THE PROTECTION OF ANY SETTLED ESTATE, AND
TO ORDER THAT ALL OR ANY PART OF THE COSTS
AND EXPENSES IN RELATION THERETO BE RAISED
AND PAID BY MEANS OF A SALE OR MORTGAGE OF OR
CHARGE UPON ALL OR ANY PART OF THE SETTLED
ESTATE, OR BE RAISED AND PAID OUT OF THE RENTS
AND PROFITS OF THE SETTLED ESTATE, OR OUT
OF ANY MONEYS OR INVESTMENTS REPRESENTING
MONEYS LIABLE TO BE LAID OUT IN THE PURCHASE
OF HEREDITAMENTS TO BE SETTLED IN THE SAME
MANNER AS THE SETTLED ESTATE, OR OUT OF THE
INCOME OF SUCH MONEYS OR INVESTMENTS, OR OUT OF
ANY ACCUMULATIONS OF RENTS, PROFITS OR INCOME.~~

This section is new. It was added in committee on the bill in the House of Commons, on the motion of Mr. Granville Ryder. As it originally appeared in the bill as printed by the House of Lords, it contained the following words at the end:—"And such sanction may be given before, or during, or after any such proceedings." These words were struck out in the House of Lords, on the motion of the Lord Chancellor, it being thought better to leave the question of time to the general law. It will be seen that the sources out of which the "costs and expenses" may be directed to be "raised and paid," are similar to those out of which the laying out, making, and executing of useful or ornamental works under sects. 20 and 21, *infra*, may be directed to be raised and paid.

This section is much more extensive than sect. 41, *infra*, which is confined to "costs and expenses incident to any application under this Act." The present section extends to "any action, defence, petition to Parliament, parliamentary opposition, or other proceedings appearing to the Court necessary for the protection of the settled estate." Its object is to throw upon the settled estate the expense of these "proceedings" in the case of limited legal owners, *e. g.* legal tenants for life, who would otherwise have to pay the "costs and expenses" of the

“proceedings” out of their own pockets. Of course, if the proceedings were reasonably and properly initiated by trustees, a Court of Equity would, in accordance with its own general principles, have power, without any statutory enactment, to allow the trustees their “costs and expenses” out of the settled estate.

SECTION 18.

Consideration for land sold for building may be a fee-farm rent.

When any land is sold for building purposes it shall be lawful for the Court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the Court shall approve.

This section is copied *verbatim* from sect. 12 of the Principal Act.

SECTION 19.

Minerals, &c. may be excepted from sales.

On any sale of land any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the Court may deem advisable.

This section is copied *verbatim* from sect. 13 of the Principal Act.

SECTION 20.

Court may authorize dedication of any part of settled estates for streets, roads, and other works.

It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the

interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained (x), from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the Court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the Court shall be deemed advisable.

This section is copied *verbatim* from sect. 14 of the Principal Act (y), the words "of Chancery in England, so far as regards estates in England, and for the Court of Chancery in Ireland, so far as regards estates in Ireland," being omitted after the words "lawful for the Court," as being no longer necessary on account of sect. 3 of this Act, *supra*.

SECTION 21.

As to laying out and making and executing and maintaining streets, roads, and other works, and expenses thereof.

Where any part of any settled estates is directed to be laid out for SUCH PURPOSES AS AFORESAID, the Court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or

(x) See *Taylor v. Taylor*, *Taylor v. Keily*, *Ex parte Taylor*, 1 Ch. D., 426; 45 L. J. (Ch.), 373.

(y) See, on that section, *Re Chambers*, 22 Beav., 653; *Re Hurle*, 2 H. & M., 196; and *Re Hargreaves*, 15 W. R., 54; *Re Venour*, 2 Ch. D., 522, and note to sect. 21.

proper fences, pavings, connexions, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, OR BE RAISED AND PAID OUT OF THE RENTS AND PROFITS OF THE SETTLED ESTATES OR ANY PART THEREOF, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, OR OUT OF THE INCOME OF SUCH MONEYS OR INVESTMENTS, OR OUT OF ANY ACCUMULATIONS OF RENTS, PROFITS, OR INCOME; AND THE COURT MAY ALSO GIVE SUCH DIRECTIONS AS IT MAY DEEM ADVISABLE FOR ANY REPAIR OR MAINTENANCE OF ANY SUCH STREETS, ROADS, PATHS, SQUARES, GARDENS, OR OTHER OPEN SPACES, SEWERS, DRAINS, OR WATERCOURSES, OR OTHER WORKS, OUT OF ANY SUCH RENTS, PROFITS, INCOME, OR ACCUMULATIONS DURING SUCH PERIOD OR PERIODS OF TIME AS TO THE COURT SHALL SEEM ADVISABLE.

This section is mainly taken from sect. 1 of "The Settled Estates Act, 1876" (39 & 40 Vict. c. 30), but that enactment has been supplemented by the addition of the provisions printed in small capitals. See, and compare, sect. 17 of this Act, *supra*.

The present enactment was passed to remove the "difficulty" raised in *Re Venour's Settled Estates* (*Venour v. Sellon*) (z). In that case part of the settled real estate consisted of a piece of land at Mile End, London, containing 2A. 2R. 4P., which was entirely vacant and unoccupied, but was well adapted for building purposes. In order, however, that it might be built upon to the greatest advantage, *it was necessary that a considerable sum should be expended in constructing roads and drains*. The real estate stood limited under the marriage settlement of

(z) 2 Ch. D., 522; 45 L. J. (Ch.), 409; 24 W. R., 752.

Mr. and Mrs. Venour, dated 30th June, 1852, to the use of Mrs. Venour (who had survived her husband) during her life, with remainder, as to one moiety, to such uses as she should by deed or will appoint, and as to the other moiety, and also as to the first-mentioned moiety in default of appointment, to the use of the children of the marriage, as tenants in common, in equal shares, with cross remainders between them in the event of any child dying under twenty-one without leaving issue. Under the same settlement a sum of 4,730*l.* 13*s.* 8*d.* consols was held upon trusts corresponding with the limitations of the real estate; and there was power to invest this fund in the purchase of land. There were five children of the marriage, of whom one, John Hamilton Venour, had attained twenty-one. Two had died under twenty-one without issue, and two were still living, but were infants. Mrs. Venour, the tenant for life, and her son, John Hamilton Venour, one of the remaindermen, presented a petition under the Leases and Sales of Settled Estates Acts, asking the Master of the Rolls to *direct*, first, that roads and drains should be constructed on the piece of land at Mile End; secondly, that so much of the consols as might be necessary for defraying the expenses of constructing the roads and drains (not exceeding, in the whole, 1,500*l.*), *should be sold and applied* in defraying such expense. The Master of the Rolls decided that he had no power to make either direction. First, he could not direct the roads and sewers to be made. "The 14th section of 'The Leases and Sales of Settled Estates Act, 1854,'" said the Master of the Rolls, "does not say that the Court may direct roads and sewers to be made, but that the Court may direct any part of the estate 'to be laid out' for roads and sewers. Those words do not mean that the Court may order the roads and sewers to be made, but merely that *the building plans sanctioned by the Court may include the construction of roads and sewers.* This view is borne out by the marginal note, 'Court may authorize dedication of parts of settled estates for roads, &c.'" Secondly, the Master of the Rolls had no power to order that the consols should be sold and applied in defraying the expenses of the (proposed) roads and drains. On this point Sir George Jessel considered that he was bound by express authority. The three cases by which he considered himself bound were,—*In re*

Chambers (a), decided by Lord Romilly, M. R., in 1860; *Re Hurles' Settled Estates* (b), decided by Lord Hatherley, when V.-C., in 1864; and *Drake v. Trefusis* (c), decided by James and Mellish, L.JJ., in 1875. In the cases of *In re Chambers* and *Re Hurles' Settled Estates* the Court of Chancery was asked to direct the sale of a portion of the settled freehold land and the application of the sale moneys to defraying the expense of constructing roads and sewers on another portion of the same land, and it was held that the Court had no power to give such a direction. In *Drake v. Trefusis*, the Court of Chancery was asked to direct that moneys arising from the sale of a portion of settled real estate should be applied towards "permanently improving farm houses, homesteads, farm buildings and cottages" on the unsold parts of the settled real estate. It was held that the Court had no power to give the direction.

The authorities on the other side were an unreported decision of Vice-Chancellor Stuart, *Re Gilbert* (d), on all fours with the present case; and *In re Newman's Settled Estates*, decided by James and Mellish, L.JJ., in 1874, when a very small sum (e), arising from the sale of timber on the settled real estate, was applied to defraying the expense of executing some drainage work on the same estate. The decision of Sir George Jessel, M.R., in the case of *Venour's Settled Estates*, virtually overruled the last-mentioned decisions.

The present section naturally divides itself into two parts, answering to the two parts of the second recital of the preamble to "The Settled Estates Act, 1876:"—"And whereas difficulty has arisen from the want of sufficient power to direct the said streets and other works to be made and executed, and to provide for the expenses in relation thereto." First, the section provides a remedy for the "difficulty" that "has arisen for want of sufficient power to direct the works to be made

(a) 28 Beav., 653.

(b) 2 Hem. & Mil., 196.

(c) L. R., 10 Ch., 364.

(d) 15th November, 1862; Reg. Lib. 1862, A., 2482, cited 2 Hem. & Mil., 199.

(e) 15l. 7s. 8d. The reasons given for the decision in that case do not, however, apply to this minute point.

and executed;" and secondly, the "difficulty" that "has arisen for want of sufficient power to provide for the expenses incurred in relation thereto."

To sanction a proposal by the petitioner to make roads and drains, and to order that roads and drains shall be made, are evidently distinct things; and yet there can be little doubt that the former power was *meant* by the Parliament of 1856 to include the latter. As regards the second part of the present section, it will confer on the Court a power, to a great extent (*f*) new, of defraying the expenses of constructing roads and drains, &c. out of the property in settlement. It is understood that there are many settled estates which will be benefited largely by this new method of providing out of these estates themselves for the cost of the improvements specified in sect. 20, *supra*.

SECTION 22.

How sales and dedications are to be effected under the direction of the Court.

On every sale or dedication to be effected as herein-before mentioned the Court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.

This section is copied *verbatim* from sect. 15 of the Principal Act (*g*).

Where, pending the completion of a sale under this Act, one of the two trustees of the settlement died, and one of the two

(*f*) In *Venour's Settled Estates* the Master of the Rolls allowed part of the consols to be sold and the proceeds to be advanced on MORTGAGE by the petitioners of their interests in the settled real estate, for the purpose of constructing the roads and drains.

(*g*) See, on that section, *Eyre v. Saunders*, 5 Jur., N. S., 783; *Re Hole*, W. N., 1868, p. 70.

purchasers declined to take a conveyance from the sole surviving trustee alone, Bacon, V. C., directed a petition to be presented for the appointment of a new trustee in the place of the deceased trustee, and the order for sale to be correspondingly varied (*h*).

SECTION 23.

Application by petition to exercise powers conferred by this Act.

Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable *on his death, or for an estate for life* (*i*) or any greater estate, AND ALSO ANY PERSON ENTITLED TO THE POSSESSION OR TO THE RECEIPT OF THE RENTS AND PROFITS OF ANY SETTLED ESTATES AS THE ASSIGNEE OF ANY PERSON WHO BUT FOR SUCH ASSIGNMENT WOULD BE ENTITLED TO SUCH ESTATES FOR A TERM OF YEARS DETERMINABLE WITH ANY LIFE, OR FOR AN ESTATE FOR ANY LIFE OR ANY GREATER ESTATE, may apply to the Court by petition in a summary way to exercise the powers conferred by this Act.

This section is mainly taken from sect. 16 of the Principal Act (*j*). The words printed in small capitals were, however, added on the report in the House of Commons, on the motion of Mr. Meldon, and the scope of the Settled Estates Acts has been correspondingly enlarged.

When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted. For instance, the present section says that the application is to be by petition. It is enabling in form, but no other process can be adopted. In the same way, when the statute says who is the person to petition,

(*h*) *Scott v. Heisch*, 24 W. R., 108; 33 L. T., 408; W. N., 1875, p. 211.

(*i*) These words should have been altered to "with any life or for an estate for any life," so as to correspond with Mr. Meldon's amendment, which follows, and with sect. 46.

(*j*) See, as to that section, *Ex parte Puzley*, 1 R., 2 Eq., 237; *Williams v. Williams*, 9 W. R., 888; *Harvey v. Clark*, 25 Beav., 7.

it means that the person or persons so described, *and no others*, shall be entitled to petition, otherwise anyone interested in the estate might petition; and the only reason for putting in such a section is to show that that is not the meaning of the legislature, but that the right of calling for the exercise of the powers shall be confined to the persons so described. When we turn from the words, which on this point appear perfectly clear, to the reason of the thing, the matter seems equally clear. The person who is to put the powers of the Court in motion for a lease or a sale of a settled estate is naturally the person in the possession of it. It would be a very singular thing for the legislature to enact that a remote remainderman might harass the person in possession by a petition for leasing or sale of an estate with which he has at that time nothing to do, and it would be a surprise to the framer of the Act to be told that anybody interested in the estate had a right to petition. But then it is said, assuming that to be so where there is a person coming within the description of the present section, still, where there is no such person, there must be somebody to petition. But this is not so. The exercise of the power is "subject to restrictions." Per Jessel, M. R., in *Taylor v. Taylor, Taylor v. Keily, Ex parte Taylor* (k).

In that case the Master of the Rolls held that where the settlor has given the possession or the receipt of the rents and profits to the trustees of the settlement, *and has strongly indicated an intention that the management of the estate should be left in their hands*, the tenant for life is not a person who can apply to the Court to grant leases under this Act. The Court of Appeal affirmed the decision of the Master of the Rolls (l), emphasising the point in italics.

In *Re Smith* (m), where the trustee approved of the sale, the equitable tenant for life was, *semble*, allowed to petition by Vice-Chancellor Hall.

By the 2nd of the new Orders, "All petitions, notices, affidavits, and other proceedings under the Act shall be entitled

(k) 1 Ch. D., 421; 45 L. J. (Ch.), 373. See sects. 4, 16 and 20, *supra*.

(l) 3 Ch. D., 145; 45 L. J. (Ch.), 848.

(m) W. N., 1878, p. 196.

'In the matter of the estates settled' [by the settlor or settlors, naming one of them and referring to the instrument by which the settlement shall have been created, and mentioning the parish or place and county in which the lands, messuages, or tenements proposed to be dealt with are situate,] 'and in the matter of the Settled Estates Act, 1877,' and every such petition shall be marked with the words 'In the High Court of Justice, Chancery Division,' and with the title of the Judge before whom it is intended to be heard (see Form No. 1 in the Appendix hereto). Upon the presentation of the petition, a day shall be appointed for hearing not less (unless the Judge gives special leave) than eight clear days after such presentation, and in the computation of such eight clear days, Sundays and other days on which the offices are closed shall not be reckoned; and every petition shall, in the body thereof, or in a schedule thereto, or by a plan thereto annexed, contain a detailed description of the property proposed to be dealt with by such petition sufficient to identify the same."

This Order has been framed with a view to shorten the title so far as is expedient. Under the old Rules a full description of the land was set out in the title. This was expensive and incumbering and unnecessary under the new Orders. It will be seen that a full description is to be set out in the body of the petition. Parties interested, who are not petitioners or concurring in the petition, are to be served with notices under the 26th section of the Act, and these notices are to give a full description of the lands. See Form No. 3 in Appendix.

By the 3rd of the new Orders, "When a petition has been put into the paper for hearing, and by reason of the parties not being ready, or for any other cause, the judge allows it to stand over generally, it may be put into the paper for a subsequent day, without any application to the Court or Judge, on the petitioner or his solicitor applying for that purpose to the secretary of the Lord Chancellor or Master of the Rolls (as the case may be), and notice of the appointment of such subsequent day shall be given by the petitioner, or his solicitor, two clear days before the day fixed to the other parties entitled to appear on such petition."

By Order 15 of the new Orders, "Upon every petition the Court shall be satisfied by sufficient evidence that it is proper

and consistent with a due regard for the interests of all parties entitled under the settlement that the powers should be exercised; and it shall be stated in the affidavit why and upon what ground it is deemed to be so."

By Order 16 of the new Orders, "Upon every petition where there are any trustees seized or possessed of any estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence is to be produced that notice of the application has been served on such trustees."

By the 31st of the new Orders, "Every petition under the Act shall set forth the name, address, and description of the petitioner, and also a place within three miles from the site of Temple Bar, where he may be served with any order of the Court or of the Judge in chambers or notice relating to the subject of such petition."

By the 18th of the new Orders, "If upon the hearing of any petition the Court shall be of opinion that notice ought to be served on any person who shall not have been served, or that notice of the application ought to be inserted in any newspaper, the court shall give directions accordingly, and the petition shall stand over generally or to such time as the Court shall direct."

By Order 32 of the new Orders, "The Judge in person sitting in Court or in chambers in the case of any petition may by special order dispense with all or any of the" new "Orders, so far as they are applicable to such petition, in any case in which he shall think fit, and upon such terms and conditions (if any) as he may deem proper."

Where the Act of 1856 has been incorporated with a private Act, the petition should be presented under the Act of 1856, and not under this Act (*m*).

SECTION 24.

With whose consent such application to be made.

Subject to the EXCEPTIONS HEREINAFTER contained, every application to the Court must be

(*m*) *Re Bolton*, W. N., 1878, p. 65.

made with the concurrence or consent of the following parties; namely,—

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one such tenant-in-tail, then the first of such tenants-in-tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant-in-tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child.

This section is copied *verbatim* (with the substitution of “exceptions hereinafter contained” for “exception contained in the next section” at the commencement) from sect. 17 of the Principal Act (*n*).

“All persons in existence.” These words do not include an unascertained person having a contingent interest under the settlement, *e.g.* the heir of the tenant for life, to whom the estate is limited in default of appointment, on the principle that “*nemo est hæres viventis*” (*o*).

“Any beneficial estate or interest.” The word “interest” is used because, if there were a trust for sale, it might be said that the persons beneficially interested had no estate, and yet

(*n*) See, as to that section, the cases cited in Shelford's R. P. Acts, 693 (8th ed., by Carson).

(*o*) *Beioley v. Carter*, L. R., 4 Ch., 230; *In re Strutt's Trusts*, L. R., 16 Eq., 629, 43 L. J. (Ch.), 69; can be supported on the authority of *Beioley v. Carter*. Per Jessel, M.R., *In re Ives*, *Bailey v. Holmes*, 3 Ch. D., 690; 24 W. R., 1068.

they would have a beneficial "interest." So, again, a person entitled to a portion charged upon an estate (*p*), or to shares in the proceeds of the sale, would have no "estate," although he would have an "interest" (*q*).

The remaindermen to concur, where property is vested in trustees upon trust after the death of the tenant for life to sell and divide the proceeds among numerous persons (the trustees having power to give receipts), are not the trustees for sale but their beneficiaries. This was so decided (and it would seem on the express words of the statute rightly) in *Re Ives, Bailey v. Holmes* (*r*), notwithstanding the previous decisions to the contrary (*s*).

A fortiori, where the trustees have no power of sale, the beneficiaries in remainder, and not the trustees of the settlement, are the proper persons to consent (*t*).

"And all trustees having any estate or interest on behalf of any unborn child." This clearly implies that trustees shall not consent for a *born* child. Per Jessel, M.R., in *Re Ives, Bailey v. Holmes* (*u*).

SECTION 25.

Court may dispense with consent in respect of certain estates.

PROVIDED ALWAYS, THAT WHERE AN INFANT IS TENANT-IN-TAIL UNDER THE SETTLEMENT, IT SHALL BE LAWFUL FOR THE COURT, IF IT SHALL THINK FIT, TO DISPENSE WITH THE CONCURRENCE OR CONSENT OF THE PERSON, IF ONLY ONE, OR ALL OR ANY OF THE PERSONS, IF MORE THAN ONE, ENTITLED,

(*p*) See *Re Boughton*, 12 W. R., 34.

(*q*) *In re Ives, Bailey v. Holmes*, 3 Ch. D., 690, per Jessel, M.R.

(*r*) 3 Ch. D., 690; 24 W. R., 1068.

(*s*) *Grey v. Jenkins*, 26 Beav., 351; *Eyre v. Saunders*, 4 Jur. (N. S.), 830; *In re Potts' Estate*, L. R., 16 Eq., 631 n. (1).

(*t*) *In re Dendy*, 4 Ch. D., 879; 46 L. J. (Ch.), 417; 25 W. R., 410.

(*u*) 3 Ch. D., 690; 24 W. R., 1068.

WHETHER BENEFICIALLY OR OTHERWISE, TO ANY ESTATE OR INTEREST SUBSEQUENT TO THE ESTATE TAIL OF SUCH INFANT.

A tenant in tail of full age has power to bar the entail by a disentailing deed, on attaining the age of twenty-one, provided the protector to the settlement (if any) consents (y).

The present section was not in the bill as originally introduced. It was added in committee on the bill in the House of Commons by Mr. Marten, Q.C., and was suggested by Sir George Jessel, M. R. The section is founded on the old practice of the House of Lords, viz.: that as the first tenant-in-tail represents the inheritance, those in remainder need not be served.

SECTION 26.

Notice to be given to persons who do not consent to or concur in the application.

PROVIDED ALWAYS, that where ON AN APPLICATION under THIS Act the concurrence or consent of any SUCH person AS AFORESAID shall not have been obtained, notice shall be given to such person in such manner as the Court to which the application shall be made shall direct, requiring him to notify within a time to be specified in such notice whether he assents to or dissents from such application, or submits his rights or interests, so far as they may be affected by such application, to be dealt with by the Court, and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the

(y) 3 & 4 Will. 4, c. 74.

person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court.

This section is copied almost *verbatim* from sect. 2 of "The Leases and Sales of Settled Estates Amendment Act, 1874," with such alterations only as to adapt it to the present Acts. "Any such person as aforesaid," *i. e.* any such person as is specified in sect. 24. The interpolation of sect. 25 in committee makes the reference a little obscure.

The Court cannot proceed to dispense with any consent under section 28, until notice has been given under this section (z).

The fact of the person whose consent is required being a married woman, does not render anything more than notice necessary (a).

In *Re Crabtree's Settled Estates* (b), a petition was presented under the Principal Act, praying that a lease of certain estates, settled by the will of J. Crabtree, might be carried into effect. Two persons of unsound mind, but not so found by inquisition, were made respondents. They were both confined in lunatic asylums. The petitioners took out a summons under the enactment for which this section is substituted, in order that directions might be given to serve notice under that enactment upon the respondents, by serving it on the managers of the asylums, or in such other way as the Court might direct. Vice-Chancellor Bacon doubted whether the case of persons of unsound mind came within the enactment; and, at his request, the application was renewed to the Lords Justices. After hearing counsel for the petitioners, the Lords Justices decided that service on the persons of unsound mind would be good under the enactment; but directed that it should be *made personally* on them, as well as on the managers of the asylums.

(z) *Re Rylar*, 24 W. R., 949.

(a) *Ibid.*

(b) L. R., 10 Ch., 201; 44 L. J. (Ch.), 261.

In *Re Slark's Settled Estates* (c), a petition was presented to obtain the sanction of the Court to certain proposed leases of a settled estate. The concurrence of all parties interested had been obtained, with the exception of one, who, by reason of extreme old age, was unable to concur in writing, as required by sect. 17 of the Principal Act. On an application to him by counsel for the petitioner, for direction as to how notice of the application should be served on the party who had not concurred under the enactment for which the present section is substituted, Sir George Jessel, M. R., directed the petition to be served on the party *personally*.

The case of *Re Chamberlain* (d), decided in July, 1875, was as follows:—Joseph Chamberlain, by his will dated the 11th of July, 1872, gave, devised, and bequeathed to two trustees all his real and personal estate and property of every description, in trust to pay debts, and funeral and testamentary expenses, and as to all the residue he directed his said trustees to sell and convert the same (if it should seem fit to them to do so) as early as conveniently might be, the receipt of such trustees alone to be a sufficient discharge for any moneys received, and directed his said trustees to invest the proceeds, and to pay the income to his wife, Frances Chamberlain, during life or widowhood, for the joint uses and maintenance of herself and his son, Francis Joseph Chamberlain, the wife's receipt alone to be a good discharge to the trustees, and the son to have no power over the estate during his mother's lifetime, but if she should die or marry again before the said son attained twenty-one, then to pay the income to him, till he attained that age, making advances for maintenance and education at their discretion. After other directions, not material to be here set out, the testator directed that if his said wife remained a widow and outlived his said son, then at her decease the whole of his estate should be divided into two moieties or equal portions, one of which should be divided equally, share and share alike, between his brothers and sisters who should be living at the time of her decease, and if none of his brothers or sisters

(c) W. N., 1875, p. 224.

(d) 23 W. R., 852.

should be then living, such of the children of his brothers and sisters as should then be alive should divide the same moiety among them, share and share alike; the other moiety to be subject to his said wife's will, and in default of any such will to go to her next of kin. A petition was presented by the widow, the infant by special guardian, and the trustees of the will, to obtain the sanction of the Court to a contract for a lease of part of the land. There were two brothers and two sisters of the testator living, all of whom were *sui juris* and had infant children. Counsel for the petitioners argued that, under the present Act, service on the brothers and sisters of the testator, as well as on their respective infant children, might be dispensed with. Sir C. Hall, V. C., said that he considered that the estate was a "settled estate" within the meaning of the Principal Act; that the power of dispensing with service given to the Court under the present Act was discretionary; that he would dispense with service on the infant children of the brothers and sisters, but that the petition must stand over until the next petition day, in order that the brothers and sisters of the testator might be served. The petition accordingly stood over; and on the following petition day, upon affidavits of service upon the testator's brothers and sisters being produced, the order was made as prayed.

In the case of *In re Dendy* (e), there were two settlements. The first was under the will (f) of Stephen Dendy, by which the testator's rights of common in the Manor of Banstead were (amongst other property) devised to trustees upon trust for his daughter Jane Dendy for life, and after her decease for the benefit of her children (if any) as she should appoint, and in default of her having any children, upon trust for his daughters, Mrs. Daniel Watney and *Elizabeth Dendy*, but if either of them should die without leaving issue who should attain twenty-one, then in trust for his last surviving daughter, her heirs and assigns. The testator died in April, 1861. In October, 1864, Elizabeth Dendy married John Watney. The second settlement was executed on her marriage. It contained a covenant to settle

(e) 4 Ch. D., 879; 46 L. J. (Ch.), 417; 25 W. R., 410.

(f) See the definition of a "settlement" under this Act, sect. 1, *supra*.

after-acquired property of the intended wife upon trust for the benefit of the intended wife and her intended husband, *with remainder to the children of the marriage*. There were four children of the marriage living and under twenty-one. Jane Dendy was living and unmarried. A conditional contract was entered into on the 2nd of August, 1876, for the sale of the rights of common to Sir J. Hartopp, for 5,737*l.* 10*s.*, and the trustees of the will and Jane Dendy petitioned for the approval of the contract. It was contended by the counsel for the petitioners that it was not necessary to serve notice under sect. 2 of "The Settled Estates Amendment Act, 1874," on the children's father, as the settlement under which they claimed was really only a sub-settlement. Vice-Chancellor Hall, however, held that notice must be served on the children's father, who must signify his assent or dissent within ten days. "I hold," said his lordship, "that these children are beneficiaries and that their consent is necessary, and I am of opinion that the trustees are not and would not be, even if their interest was one in possession within the meaning of the Act, the proper persons to represent them."

In *Re Drinkwater's Settled Estates*, decided in July, 1876, Sir George Jessel, M.R., held, that *substituted* service could not be effected under this section on a person whose consent to a sale of certain settled estates was required, and who was known to have gone to Australia in 1862, but who could not be found. "The section," said his lordship, "requires *personal service*" (*g*).

In the case of *Re Rylar* (*h*), Sir George Jessel, M.R., directed that notice should be given to a married woman, entitled to a small share of the settled estate, and *resident in New Zealand*, by post, addressed to her supposed place of residence in New Zealand, limiting a time for her to notify her assent or dissent.

Sect. 27, *infra*, will render these cumbersome processes unnecessary in such cases.

By the 4th of the new Orders, "The notice required to be given by the 26th section of the Act, if given before the hearing (or, if given after the hearing, and the Judge shall not otherwise direct) may, without any other direction of the Court, be given within the jurisdiction of the Court, except

(*g*) 11 N. C., 162.

(*h*) 24 W. R., 949.

in the case of a person of unsound mind, not so found by inquisition, by delivering to the person to be served a notice (in the form No. 3 in the Appendix hereto) with such variations as circumstances require, and the time to be specified in such notice for the person served to deliver or leave a notification shall—(a) in case the person to be served is a guardian of an infant, be such as shall be directed by the Judge in the order appointing the guardian, and in case the person to be served is a married woman, or a committee of a lunatic, not less than twenty-eight clear days after the service; (b) and in other cases not less than fourteen clear days after the service. In case the person to be served is of unsound mind, not so found by inquisition, or out of the jurisdiction of the Court, or it is desired to serve such notice on any person within the jurisdiction of the Court in any other manner than above provided, an application shall be made at chambers *ex parte* by the petitioner for directions as to the manner in which such notice shall be given, and as to the time to be specified in such notice within which the notification is to be made by the person served.”

This Order was framed to carry out this section without the necessity of special applications in the cases in which no special direction is required. It would be useless to make a special application as to the manner of service where service can be effected in the manner provided by this Order.

By the 22nd of the new Orders, “Any person served with a notice, pursuant to the 26th section of the Act, requiring him to notify whether he assents to or dissents from the application or submits his rights or interests, so far as they may be affected by such application, to be dealt with by the Court; and any trustee or other person served with notice pursuant to the 30th section of the Act, shall be at liberty, upon reasonable notice to the petitioner’s solicitor, to inspect and peruse the petition without payment of any fee, and he shall be entitled to be furnished with a copy thereof upon such application, terms, and conditions as are provided by Rules 8, 9, 12 and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875.”

SECTION 27.

Court may dispense with notice under certain circumstances.

PROVIDED ALSO, THAT WHERE ON AN APPLICATION UNDER THIS ACT THE CONCURRENCE OR CONSENT OF ANY SUCH PERSON AS AFORESAID SHALL NOT HAVE BEEN OBTAINED, AND IN CASE SUCH PERSON CANNOT BE FOUND, OR IN CASE IT SHALL BE UNCERTAIN WHETHER HE BE LIVING OR DEAD, OR IN CASE IT SHALL APPEAR TO THE COURT THAT SUCH NOTICE AS AFORESAID CANNOT BE GIVEN TO SUCH PERSON WITHOUT EXPENSE DISPROPORTIONATE TO THE VALUE OF THE SUBJECT-MATTER OF THE APPLICATION, THEN AND IN ANY SUCH CASE THE COURT, IF IT SHALL THINK FIT, EITHER ON THE GROUND OF THE RIGHTS OR INTERESTS OF SUCH PERSON BEING SMALL OR REMOTE, OR BEING SIMILAR TO THE RIGHTS OR INTERESTS OF ANY OTHER PERSON OR PERSONS, OR ON ANY OTHER GROUND, MAY BY ORDER DISPENSE WITH NOTICE TO SUCH PERSON, AND SUCH PERSON SHALL THEREUPON BE DEEMED TO HAVE SUBMITTED HIS RIGHTS AND INTERESTS TO BE DEALT WITH BY THE COURT.

This section is new. It empowers the Court to dispense with *notice* altogether. Sect. 2 of "The Leases and Sales of Settled Estates Amendment Act, 1874" (now sect. 26 of this Act), only empowered the Court to dispense with *consents* after notice had been given. The present section removes the difficulty raised in *Re Rylar* (i).

The section is adapted from sect. 3 of "The Partition Act, 1876" (39 & 40 Vict. c. 17).

(i) 24 W. R., 949, cited under sect. 26, *supra*, 409.

SECTION 28.

Court may dispense with consent, having regard to the number and interests of parties.

An order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the Court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom or who submit or are to be deemed to submit their rights or interests to be dealt with by the Court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made (*j*); and every order of the Court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

This section is copied *verbatim* from sect. 3 of "The Leases and Sales of Settled Estates Amendment Act, 1874," the words "under the Principal Act" being omitted after the words "an order" at the commencement of the section.

This section affords an additional security to the party objecting, the Court being expressly required to "have regard to the *quantum* of his estate or interest" ("the amount" of the interest is the expression used by the Lord Chancellor).

In the case of *Re Lewis's Settled Estates* (*k*), Sir C. Hall, V. C., held, that under the present enactment it was unnecessary to make a child who was entitled to an estate in remainder, and was born after the presentation of the petition, but before the hearing, a party to the petition, and he directed that the order on the petition should contain a statement that the Court did not require the new-born child to be made a party.

In the case of *Re Thorpe* (*l*), Sir R. Malins, V. C., dispensed

(*j*) See the recent case of *Re Spurway*, W. N., 1878, p. 238; 13 N. C., 159.

(*k*) 24 W. R., 103; W. N., 1875, p. 190; 10 N. C., 153.

(*l*) W. N., 1876, p. 251.

with the consent of one of eight children, a daughter, who married after the presentation of the petition, on the terms that she and her husband should be served with the petition.

This section must be read in connection with sect. 26, which *requires notice* of the application to be first given. The Court cannot under this section dispense with any consent *without* notice of the application having been previously given under sect. 26. Per Sir George Jessel, M.R., in *Re Rylar (l)*, decided in July, 1876.

There can be little doubt that this view of the construction of the two sections, though extremely inconvenient, was correct. A different view of the construction of the two sections had however been taken in *Re Hooke's Estate (m)*, decided in February, 1875, by Vice-Chancellor Malins, who considered that he had power to *dispense with notice* to the remaindermen for life and in tail of a settled estate on an application for a sale of the settled estate. This decision was followed in *Re Cundee's Settled Estates (n)*, decided in July, 1877, by Vice-Chancellor Bacon, who dispensed with notice to a person entitled to a life interest in one-tenth of a settled estate on an application for a power to grant leases of the settled estate.

The power assumed by Vice-Chancellor Malins appears to have been *ultra vires*. The decision of Vice-Chancellor Bacon, however, may be supported on the ground that the present Act had come into force shortly before that decision was given (o), and by sect. 27 of the present Act, *supra*, the Court is expressly empowered to "dispense with notice."

The principles on which sect. 2 of "The Leases and Sales of Settled Estates Amendment Act, 1874," (sect. 26 of this Act) ought to be applied (or, rather, *not* applied) by the Chancery Division of the High Court of Justice have been thus enunciated by the Master of the Rolls:—

"It does not appear to me that the meaning of the new statute was, that the Court should decide simply according to its own notion of what would be best to be done with the pro-

(l) 24 W. R., 949.

(m) W. N., 1875, p. 29.

(n) W. N., 1877, p. 184; 12 N. C., 163.

(o) This Act received the Royal Assent on the 28th of June, 1877; the decision was given on the 14th of July, 1877.

perty. It does appear, so far as I can form an opinion at present as to the grounds on which such a jurisdiction should be exercised, that it was only in cases of comparatively *unimportant persons*—that is to say, *unimportant as regards value or interest in the estate*—*dissenting*, that the Court ought to exercise such a power as this, and I should require much further argument to convince me that where the persons were equal in number, and where the values of the interest approach so closely, the Court, having regard to the number and value of interest of those who dissented, ought to exercise the discretion given to it by the 3rd section of the Act. My present opinion is that it ought not.”

In that case Mrs. Taylor, the tenant for life, beneficially, was sixty-one. If she survived Mr. Keily, aged forty-three, she would become entitled, beneficially, to the whole; if she died in his lifetime, he would become entitled to the whole. He dissented, and she petitioned. Sir George Jessel, M.R., refused to dispense with Mr. Keily's concurrence (*p*).

SECTION 29.

Petition may be granted without consent, saving rights of non-consenting parties.

Provided nevertheless, that it shall be lawful for the Court, if it shall think fit, to give effect to any petition subject to and so as not to affect the rights, estate, or interest of any person whose concurrence or consent has been refused, OR WHO HAS NOT SUBMITTED OR IS NOT DEEMED TO HAVE SUBMITTED HIS RIGHTS OR INTERESTS TO BE DEALT WITH BY THE COURT, or whose rights, estate, or interest ought in the opinion of the Court to be excepted.

This section is mainly taken from sect. 18 of the Principal Act (*q*), the words “unless there shall be a person entitled to an

(*p*) *Taylor v. Taylor, Taylor v. Keily, Ex parte Taylor*, 1 Ch. D., 426; 45 L. J. (Ch.), 373; affirmed on appeal, 3 Ch. D., 145; 35 L. T., 450; 45 L. J. (Ch.), 848.

(*q*) For the cases under that section, see Shelford's R. P. Acts, 694 (8th ed., by Carson).

estate of inheritance whose consent or concurrence shall have been refused or cannot be obtained," being omitted, and the words printed in small capitals (*r*) being added. The scope of the enactment has thus been enlarged.

SECTION 30.

Notice of application to be served on all trustees, &c.

Notice of any application to the Court under this Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the Court ought to be so served, unless the Court shall think fit to dispense with such notice.

This section is copied *verbatim* from sect. 19 of the Principal Act.

SECTION 31.

Notice of application to be given in newspapers if Court direct.

Notice of any application to the Court under this Act shall, IF THE COURT SHALL SO DIRECT, BUT NOT OTHERWISE, be inserted in such newspapers as the Court shall direct; and any person or body corporate, whether interested in the estate or not, may apply to the Court by motion for leave to be heard in opposition to or in support of any application which may be made to the Court under this Act; and the Court is hereby authorized to permit such person or corporation to appear and be heard in opposition to or support of any such applica-

(*r*) These words were rendered necessary by the provisions of sects. 26, 27 and 28, *supra*.

tion, on such terms as to costs or otherwise, and in such manner, as it shall think fit.

This section is copied from sect. 20 of the Principal Act (*s*), the words printed in small capitals, which give a discretion to the Court as to whether notice shall, or shall not, be inserted in any newspapers, being added. These words were inserted in committee on the bill in the House of Lords on the motion of the Lord Chancellor. The new power to dispense *altogether* with any newspaper advertisement is a most useful one, and no time has been lost in giving effect to it.

In *Re Chilcott's Estate* (*t*), which was decided on the 30th of November, 1877, Vice-Chancellor Malins, on a petition "in which the parties themselves were the only persons interested," for the sanction of the Court to a lease of settled estates for building purposes, dispensed, under this section, on the application *ex parte* of counsel for the petitioner, with the issuing of any advertisements. "The 31st section of the Act," said his lordship, "is a salutary provision, and it will be a very extraordinary case which will induce me to require advertisements to be issued." Vice-Chancellor Malins dispensed with the examination and consent of a married woman entitled to contingent rent-charges on the estate, no advertisements being necessary under that section (*u*). Where all parties interested under the settlement are represented on the application, it is immaterial that the settlor is described in the advertisement as of a different county from that to which he is stated to have belonged in the petition (*v*).

By the 19th of the new Orders, "When the Court shall at the hearing have directed notice of any application to be inserted in any newspapers, any person may, within the time specified in the notice, apply to the Court by motion, either *ex parte* or upon notice to the petitioner, for leave to be

(*s*) See, as to the practice under that section, Order XLI. of the Consolidated Orders of the Court of Chancery, Rules 16—20, and the cases cited under those Rules in Shelford's R. P. Acts, 706 (8th ed., by Carson). See also the cases cited, p. 694, under s. 20. (*t*) W. N., 1877, p. 259.

(*u*) *Re Earl of Kilmorey*, 26 W. R., 54.

(*v*) *In re Hemsley's Settled Estates*, L. R., 16, Eq., 315; 29 L. T., 173; 43 L. J. (Ch.), 72.

heard in opposition to or in support of the application, but if such motion shall be made *ex parte*, and the Court shall think fit to give such leave, it shall be subject to such order as the Court shall think fit to make as to costs."

The former Act required notice by advertisement in newspapers in every case, which caused great expense and delay. Such notices are, under this Act, only to be given if the Court directs.

By the 20th of the new Orders, "Any such person having obtained leave under the last preceding order shall be at liberty, upon reasonable notice, to inspect and peruse the petition at the office of the solicitor for the petitioner, upon payment of a fee of 13s. 4d. on each inspection, and shall be entitled (either without or after such inspection) to be furnished with a copy of such petition upon such application, terms, and conditions as are provided by Rules 8, 9, 12 and 13 of Order V. of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875."

By the 21st of the new Orders, "Any order made on an *ex parte* motion giving leave to such person to be heard on any application shall be served on the solicitor for the petitioner."

Before leaving the subject of notice it may be added that by the 24th of the new Orders, "Every order shall state, in addition to the names of the petitioners, the names of the persons other than the petitioners who concur or consent, or to whom notice of the application has been given, or who (under Order 19), may have obtained leave to be heard in opposition to or in support of the application, and whether any notification was received from the persons to whom notice has been given, and if any has been received the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any and what rights, estate, or interest of any person whose concurrence or consent has been refused, or who shall not or shall not be deemed to have submitted his rights or interests to be dealt with by the Court, or whose rights or interests ought, in the opinion of the Court, to be excepted."

SECTION 32.

No application under this Act to be granted where a similar application has been rejected by parliament.

The Court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament for a private Act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the Judges to whom the bill may have been referred.

This section is copied *verbatim* from s. 21 of the Principal Act (v).

SECTION 33.

Notice of the exercise of powers to be given as directed by the Court.

The Court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this Act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the Court to be practicable and expedient for preventing fraud or mistake.

This section is copied *verbatim* from s. 22 of the Principal Act.

By the 23rd of the new Orders, "In all cases in which land in a register county or district is affected by the exercise of any powers conferred on the Court by the Act, and the Court shall direct notice to be recorded pursuant to the 33rd section of the Act, such notice may be given by directing a memorial of the order to be registered. And in all cases in which the Court shall not think it practicable or expedient that notice under the said section should be recorded as therein mentioned, the order shall state that no record of the order need be made" (x).

(v) See *Re Wilson's Estate Bill*, 1 L. T., 25.

(x) For the practice under Order XLI. of Consolidated Orders of the Court of Chancery, Rule 24, see Shelford's R. P. Acts, 707 (8th ed., by Carson).

SECTION 34.

Payment and application of moneys arising from sales or set aside out of rent, &c. reserved on mining leases.

All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid (v), may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, SO FAR AS RELATES TO ESTATES IN ENGLAND, SHALL BE PAID INTO COURT EX PARTE THE APPLICANT IN THE MATTER OF THIS ACT (x), AND SO FAR AS RELATES TO ESTATES IN IRELAND, shall be paid into the Bank of Ireland to the account of the Accountant-General *ex parte* the applicant in the matter of this Act; and such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes, namely,—

SO FAR AS RELATES TO ESTATES IN ENGLAND, the purchase or redemption of the land tax, AND SO FAR AS RELATES TO ESTATES IN IRELAND, THE PURCHASE OR REDEMPTION OF RENT-CHARGE IN LIEU OF TITHES, CROWN RENT, OR QUIT RENT (y).

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

(v) This refers to sect. 4 (3), p. 384, *supra*.

(x) See the Chancery Funds Act, 1872, and the Chancery Funds Rules, 1874.

(y) As to this, see "The Irish Church Act, 1869," sect. 32.

The payment to any person becoming absolutely entitled.

This section is mainly taken from sect. 23 of the Principal Act (z), the provisions printed in small capitals being however new.

The words "so far as relates to estates in England," and the words "and so far as relates to estates in Ireland, the purchase or redemption of rent charge in lieu of tithes, crown rent, or quit rent," were not in the bill, as originally introduced. They were added on the Report in the House of Commons, on the motion of Mr. Meldon, on the ground that the Irish investments specified in his amendment corresponded to the English investments copied from the Principal Act.

See s. 69 of "The Lands Clauses Consolidation Act, 1845" (8 Vict. c. 18).

"The payment to any person becoming absolutely entitled." Malins, V. C., in the case of *In Re Wood's Settled Estates* (a), in June, 1875, allowed the tenant in tail of the settled estates to receive the proceeds of the sale (which had been paid into Court) without previously executing a disentailing deed. Jessel, M.R., on the other hand, in the case of *Re Broadwood's Settled Estates* (b), in November, 1875, without expressly deciding that a disentailing deed was, under similar circumstances, necessary, thought it better that one should be executed, and ordered accordingly.

See, also, *Re Reynolds* (c) and *Re Hilliard* (d).

SECTION 35.

Trustees may apply moneys in certain cases without application to Court.

The application of the money in manner aforesaid may, if the Court shall so direct, be made by

(z) See, on that section, the cases cited in Shelford's R. P. Acts, 695, 696 (8th ed., by Carson).

(a) L. R., 20 Eq., 372.

(b) 1 Ch. D., 438; 45 L. J. (Ch.), 168; 24 W. R., 108. The report of the observations of the Master of the Rolls in the *Weekly Reporter* is the fullest. His lordship does not appear to have finally decided the point.

(c) 3 Ch. D., 61.

(d) 38 L. T., 93.

the trustees (if any) without any application to the Court, or otherwise upon an order of the Court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

This section is copied *verbatim* from sect. 24 of the Principal Act.

SECTION 36.

Until money can be applied, to be invested, and dividends to be paid to parties entitled.

Until the money can be applied as aforesaid, the same shall be invested AS THE COURT SHALL DIRECT IN SOME OR ONE OF THE INVESTMENTS IN WHICH CASH UNDER THE CONTROL OF THE COURT IS FOR THE TIME BEING AUTHORIZED TO BE INVESTED, and the interest and dividends of SUCH INVESTMENTS shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

This section is mainly taken from sect. 25 of the Principal Act (d). The doubt as to the discretion of the Court in relation to investments of moneys under the Settled Estates Acts has, however, been cleared up by the substitution of the words printed in small capitals for the words "in Exchequer bills or in Three per Centum Consolidated Bank Annuities, as the Court shall think fit." The view taken of the proper construction of sect. 25 of the Principal Act by Vice-Chancellor Malins in the case of *In Re Wilkinson* (e), and recently re-asserted by his lordship in the case of *In Re Taddy's Settled Estates* (f), has been adopted by the legislature; and the con-

(d) See, on that section, the cases cited in Shelford's R. P. Acts, 696, 697 (8th ed., by Carson).

(e) L. R., 9 Eq., 343.

(f) L. R., 16 Eq., 532; see also *Re Cook*, L. R., 12 Eq., 12.

flict of authorities (*g*) as to the proper *interim* investment of the proceeds of the sale can no longer exist.

By Rule 1 of the Order of the 1st of February, 1861 (made in pursuance of the 23 & 24 Vict. c. 38, s. 10), cash under the control of the Court may be invested in Bank Stock, East India Stock, Exchequer bills, £2:10s. per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales; as well as in Consolidated £3 per Cent. Annuities, Reduced £3 per Cent. Annuities, and New £3 per Cent. Annuities.

SECTION 37.

Court may direct application of money in respect of leases or reversions as may appear just.

WHERE ANY PURCHASE-MONEY PAID INTO COURT UNDER THE PROVISIONS OF THIS ACT SHALL HAVE BEEN PAID IN RESPECT OF ANY LEASE FOR A LIFE OR LIVES OR YEARS, OR FOR A LIFE OR LIVES AND YEARS, OR ANY ESTATE IN LANDS LESS THAN THE WHOLE FEE SIMPLE THEREOF; OR OF ANY REVERSION DEPENDENT ON ANY SUCH LEASE OR ESTATE, IT SHALL BE LAWFUL FOR THE COURT ON THE PETITION OF ANY PARTY INTERESTED IN SUCH MONEY TO ORDER THAT THE SAME SHALL BE LAID OUT, INVESTED, ACCUMULATED, AND PAID IN SUCH MANNER AS THE SAID COURT MAY CONSIDER WILL GIVE TO THE PARTIES INTERESTED IN SUCH MONEY THE SAME BENEFIT THEREFROM AS THEY MIGHT LAWFULLY HAVE HAD FROM THE LEASE, ESTATE, OR REVERSION IN RESPECT OF WHICH SUCH MONEY SHALL HAVE BEEN PAID, OR AS NEAR THERETO AS MAY BE.

This section is new.

The section has been adapted from the 74th section of "The Lands Clauses Consolidation Act, 1845" (8 Vict. c. 18). The

(*g*) See, as to the opposite view, *Re Shaw*, L. R., 14 Eq., 9; *Re Boyd*, 21 W. R., 667; *Langmead v. Cockerton*, W. N., 1877, p. 43; 12 N. C., 39.

Court had no power previously to direct the application of purchase moneys paid into Court under the Settled Estates Acts, in respect of leases and reversions. It was a *casus omissus*. The omission has now been supplied.

SECTION 38.

Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.

This section is taken from sect. 26 of the Principal Act. The words "or manifest intention" after "express declaration," and the words "or may reasonably be inferred therefrom, or from extrinsic circumstances or evidence" after the words "contained in the settlement," have been omitted, and the powers of the Court have been correspondingly enlarged. The words so omitted were contained in the bill as originally introduced; but the Right Honorable Hugh Law, ex-Attorney-General for Ireland, succeeded in getting them expunged in committee on the bill in the House of Commons. The omission of the words is decidedly beneficial.

In *Re Williams* (A), Vice-Chancellor Malins sanctioned a sale of a settled estate during the lives of two tenants for life of different parts of the estate, although the will contained an "express declaration" that the estate should not be sold till after the death of the survivor of them.

SECTION 39.

Court not to authorize any act which could not have been authorized by the settlor.

Nothing in this Act shall be construed to empower the Court to authorize any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorized in and by the settlement by the settlor or settlors.

This section is copied *verbatim* from sect. 27 of the Principal Act.

SECTION 40.

Acts of the court in professed pursuance of this Act not to be invalidated.

After the completion of any lease or sale or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorize the same, except that no such lease, sale, or other act shall have any effect against SUCH PERSON AS HEREIN MENTIONED whose concurrence or consent ought to be obtained, OR WHO OUGHT TO BE SERVED WITH NOTICE, OR IN RESPECT OF WHOM AN ORDER DISPENSING WITH SUCH SERVICE OUGHT TO BE OBTAINED IN THE CASE where such concurrence or consent has not been obtained AND SUCH SERVICE HAS NOT BEEN MADE OR DISPENSED WITH.

This section is mainly taken from sect. 28 of the Principal Act (i), with the addition of the words printed in small capitals.

"Or who ought to be served with notice." See sect. 26, *supra*.

"Or in respect of whom an order dispensing with such notice ought to be obtained." See sect. 27, *supra*.

(i) See, as to that section, *Re Thompson*, Johns., 418; *Re Shephard*, L. R., 8 Eq., 571; *Re Burdin*, 5 Jur. (N. S.), 1378; and *Beioley v. Carter*, L. R., 4 Ch. 230.

SECTION 41.

Costs.

It shall be lawful for the Court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement and subject to the same limitations; and the Court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the Court shall direct.

This section is copied *verbatim* from sect. 29 of the Principal Act (k).

By the 29th of the new Orders, "The fees and allowances to solicitors of the Court in respect to proceedings under the Act shall be such as are provided by Order VI. of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875 (l), and are applicable to such proceedings, and solicitors shall be entitled to charge and be allowed for a request and certificate under the 14th Order (of these Orders), and for attendances at the Judges' chambers to procure the appointment of an examiner thereon, a fee of 13s. 4d. if the lower scale of fees is applicable, and 17. 1s. in other cases" (m).

By the 30th of the new Orders, "The fees to be taken by the officers of the Court in respect to proceedings under the Act shall be such as are provided by the Orders under the Supreme Court of Judicature Act, 1875, dated 28th October, 1875 (n), and are applicable to such proceedings; and every

(k) See, on that section, *Re Tunstall*, 14 L. T., 352, and *Re Hurle*, 2 H. & M., 196, 204.

(l) See Charley's Judicature Acts, 3rd edition, p. 891.

(m) The existing fees and allowances to solicitors will apply to the proceedings under this Act, except in the one instance provided for.

(n) See Charley's Judicature Acts, 3rd edition, p. 923.

request under the 14th Order (of these Orders) shall bear a stamp of 2s. if the lower scale of fees is applicable, and 3s. in other cases."

As to the costs of applications intended to benefit estates to which persons are successively entitled, see *Re Parby* (o).

As to the costs to be paid by a railway company where two petitions are presented, and the Court considers that one would have been sufficient, see *Re Pattison* (p).

See also, as to "costs and expenses," sect. 17 of this Act, *supra*.

SECTION 42.

Rules and orders.

General Rules and Orders of Court for carrying into effect the purposes of this Act, and for regulating the times and form and mode of procedure, and generally the practice of the Court in respect of the matters to which this Act relates, and for regulating the fees and allowances to all officers and solicitors of the Court in respect to such matters, shall be made so far as relates to proceedings in England by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other Judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand (q), such appointment to continue for such time as shall be specified therein, and so far as relates to proceedings in Ireland by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely,

(o) 29 L. T., 72.

(p) W. N., 1877, p. 290.

(q) The "four other Judges" are the three Vice-Chancellors and Mr. Justice Fry. See p. 452.

the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other Judges of the Superior Courts in Ireland to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such Rules and Orders may from time to time be rescinded or altered by the like authorities respectively, and all such Rules and Orders shall take effect as General Orders of the Court.

This section is partly taken from sect. 30 of the Principal Act, and partly from sect. 17 of "The Appellate Jurisdiction Act, 1876."

As the clause originally stood, the power of making the new Rules and Orders of Court in Ireland was vested in "any two or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Irish Master of the Rolls, and the Lord Justice of the Court of Appeal in Chancery in Ireland." This was in accordance with the provisions of the 30th section of the Principal Act. On the motion of Mr. Meldon, however, the word "three" was substituted for "two," the words, "the Irish Master of the Rolls and the Lord Justice of the Court of Appeal in Chancery in Ireland" were omitted, and the following words were inserted:—"the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron and four other Judges of the Superior Courts in Ireland, to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein."

This amendment vested the power of making new Rules and Orders of Court in Ireland under the Act in a body similarly constituted to the body in whom the power of making new Rules and Orders of Court in England under the Act was vested by the previous part of the clause. One curious effect, however,

of the amendment is to constitute a *different* body for making Rules and Orders of Court in Ireland under *this* Act from that constituted by "The Supreme Court of Judicature Act (Ireland), 1877" (*r*), for making Rules of Court in Ireland under *that* Act, which was passed in the same session as this.

The body in whom the power of making Rules and Orders of Court in England under this Act is vested by this section is identical (*s*), on the other hand, with the body in whom the power of making Rules of the Supreme Court in England is vested by "The Appellate Jurisdiction Act, 1876." There is no enactment for Ireland corresponding to the latter part of sect. 17 of "The Appellate Jurisdiction Act, 1876," which appears, indeed, to have escaped the notice of the framers of "The Supreme Court of Judicature Act (Ireland) 1877," who have gone back to the old provision of sect. 17 of "The Supreme Court of Judicature Act, 1875," for their legislative body.

The present measure received the Royal Assent on the 28th of June, 1877, while "The Supreme Court of Judicature Act (Ireland), 1877," was not out of committee till the 21st of July, 1877, and did not receive the Royal Assent till the 14th of August, 1877. It was, therefore, impossible for Mr. Meldon to know what shape the new body for framing Rules of Court, under the latter Act, might assume. The most important effect of his amendment was to exclude Lord Justice Christian (who has since resigned) from the body in whom the power of making Rules and Orders of Court, under this Act, is vested.

The "proceedings" under the Principal Act in England have previously been regulated by the forty-first order of the Consolidated General Orders of the English Court of Chancery, Rules 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25, and by the 21st, 22nd and 23rd Rules of the Regulations as to Business, of the 8th of August, 1857 (*t*).

The proceedings in the Irish Court of Chancery, under the

(*r*) 40 & 41 Vict. c. 57, s. 61.

(*s*) But the four Judges selected by the Lord Chancellor are not the same. The selection was necessarily confined to the Chancery Judges.

(*t*) These Orders and Rules will be found in Shelford's Real Property Acts, by Carson, 8th edition, pp. 705—708.

Principal Act, were previously regulated by "General Orders" issued, under sect. 30 of that Act, on the 22nd of May, 1857, by Lord Chancellor Brady, with the advice and assistance of Lord Justice Blackburne, and the then Irish Master of the Rolls, the Right Hon. T. B. Cusack Smith (u).

Orders were made under this section "so far as related to proceedings in England," in December, 1878, coming in force on the 7th of January, 1879 (Order XXXIII.) (x). They will be found appended *en bloc* to the present Act, at pp. 453—462, and also distributed under the appropriate sections of the Act.

Orders will shortly be made under this section "so far as relates to proceedings in Ireland" also.

SECTION 43.

Rules and orders to be laid before parliament.

All General Rules and Orders made as afore-said shall be laid before each House of Parliament within forty days after the making thereof if parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session, and if an address is presented to her Majesty by either House of Parliament within the next subsequent forty days on which the said house shall have sat, praying that any such Rule or Order may be annulled, her Majesty may thereupon by Order in Council annul the same, and the Rule or Order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

(u) These Orders will be found prefixed to Vol. VI. of the Irish Chancery Reports, 1856—1857.

(x) This has afforded an opportunity for revising the practice under the old Orders and of simplifying the procedure.

This section is taken partly from sect. 31 of the Principal Act, and partly from sect. 25 of the Supreme Court of Judicature Act, 1875.

It will be perceived that the "General Rules and Orders," made under sect. 42 of this Act, *supra*, are valid, *until* annulled pursuant to this section, and that an Address to the Crown and an Order in Council are necessary for the annulling of any Rule.

SECTION 44.

Concurrent jurisdiction of the Court of Chancery of the County Palatine of Lancaster.

THE POWERS VESTED IN THE HIGH COURT OF JUSTICE BY THIS ACT MAY, SO FAR AS RELATES TO ESTATES WITHIN THE COUNTY PALATINE OF LANCASTER, BE EXERCISED ALSO BY THE COURT OF CHANCERY OF THE SAID COUNTY PALATINE; AND GENERAL RULES AND ORDERS OF COURT FOR THE PURPOSES AFORESAID, SO FAR AS RELATES TO PROCEEDINGS IN THE SAID COURT OF THE SAID COUNTY PALATINE, SHALL BE MADE BY THE CHANCELLOR OF THE DUCHY AND COUNTY PALATINE OF LANCASTER, WITH THE ADVICE AND CONSENT OF ANY ONE OR MORE OF THE PERSONS AUTHORIZED UNDER THIS ACT TO CONCUR IN THE MAKING OF GENERAL RULES AND ORDERS RELATING TO PROCEEDINGS IN ENGLAND, AND ALSO WITH THE ADVICE AND CONSENT OF THE VICE-CHANCELLOR OF THE SAID COUNTY PALATINE.

This section is new. It was drafted by Mr. Marten, Q.C., in consultation with the Vice-Chancellor of the County Palatine, Mr. Little, Q.C., and was added to the bill on the motion of Mr. Marten, on the report, in the House of Commons.

By sect. 12 of the Court of Chancery of Lancaster Act, 1854 (*y*), it was provided, that, "when under or by virtue of any Act of Parliament already made and passed, *or which may*

(*y*) 17 & 18 Vict. c. 82.

hereafter be made and passed, power and jurisdiction are or shall be given to the High Court of Chancery to manage, dispose of, or deal with the property of infants or other persons under disability, or to manage, dispose of, or deal with property in the administration of assets, then, and in every such case (unless in any Act the contrary be expressly enacted), it shall be lawful for the Court of Chancery of the County Palatine, so far only as regards all persons and property within its jurisdiction, to exercise the like power and jurisdiction in the same manner, and subject to the same restrictions, in all respects as the said High Court of Chancery might exercise in the like matters."

SECTION 45.

Application for lease or sale in Ireland may be made to Landed Estates Court.

IT SHALL AND MAY BE LAWFUL FOR ANY PERSON WHO UNDER THE PROVISIONS OF THIS ACT MAY MAKE AN APPLICATION TO THE COURT OF CHANCERY IN IRELAND (y) FOR THE LEASE OR SALE OF A SETTLED ESTATE, INSTEAD OF MAKING SUCH APPLICATION TO THE SAID COURT OF CHANCERY IN IRELAND TO APPLY TO THE LANDED ESTATES COURT, IRELAND, FOR THE PURPOSE OF HAVING THE LEASE OR SALE OF SUCH SETTLED ESTATE UNDER THE SAID LAST-MENTIONED COURT; AND THEREUPON IT SHALL BE LAWFUL FOR THE SAID LANDED ESTATES COURT, IRELAND, TO EXERCISE ALL THE POWERS CONFERRED UPON THE COURT OF CHANCERY IN IRELAND IN RELATION TO LEASES OR SALES OF SUCH NATURE UNDER THE PROVISIONS OF THIS ACT, SAVE THAT THE JUDGE IN THE CASE OF A SALE SHALL HIMSELF EXECUTE THE CONVEYANCE TO THE PURCHASER UNDER SUCH SALE, AND SAVE THAT SUCH CONVEYANCE SHALL HAVE THE LIKE OPERATION AND

(y) Now the Chancery Division of the High Court of Justice (Ireland).

EFFECT, AND CONFER SUCH INDEFEASIBLE TITLE TO THE PURCHASER AS IF SUCH SALE HAD BEEN MADE AND SUCH CONVEYANCE HAD BEEN EXECUTED UPON AN APPLICATION FOR THE SALE OF AN INCUMBERED ESTATE UNDER THE ACT OF THE TWENTY-FIRST AND TWENTY-SECOND YEARS OF HER MAJESTY, CHAPTER SEVENTY-TWO: PROVIDED ALWAYS, THAT THE LANDED ESTATES COURT, IRELAND (2), SHALL MAKE SUCH INVESTIGATION OF THE TITLE AND CIRCUMSTANCES OF THE SAID ESTATES AS SHALL APPEAR EXPEDIENT, AND ALSO IN CASES OF SALES AS IN OTHER CASES PRELIMINARY TO SALES CONDUCTED IN THE SAID LANDED ESTATES COURT, IRELAND: PROVIDED ALSO, THAT EVERY DECISION AND ORDER IN THE COURSE OF SUCH PROCEEDINGS SHALL BE SUBJECT TO APPEAL TO THE COURT OF APPEAL IN CHANCERY AS IN OTHER CASES UNDER THE SAID ACT.

This section is new. It was inserted on the report in the House of Commons, on the motion of Mr. Meldon. The section is adapted from sect. 46 of the statute 21 & 22 Vict. c. 72—“An Act to facilitate the Sale and Transfer of Land in Ireland.” The only material modification is the insertion of the words, “lease or,” “leases or,” before the word “sale” or “sales,” thereby vesting in the Landed Estates Court, Ireland, the same powers as the Irish Court of Chancery in relation to *leases* of settled estates.

Under the 46th section of the 21 & 22 Vict. c. 72, the Landed Estates Court, Ireland, was armed with the same powers as the Irish Court of Chancery only in relation to *sales* of settled estates.

(2) The Landed Estates Court (Ireland) has, since this enactment was passed, become part of the Supreme Court of Judicature (Ireland), and the Judges of it have become the “Land Judges” of the Chancery Division of the High Court of Justice (Ireland). 40 & 41 Vict. c. 57, ss. 4, 7.

SECTION 46.

Tenants for life, &c., may grant leases for twenty-one years.

It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for ANY life, or for a term of years determinable with ANY life OR LIVES, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise, and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the courtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years SO FAR AS RELATES TO ESTATES IN ENGLAND, AND THIRTY-FIVE YEARS SO FAR AS RELATES TO ESTATES IN IRELAND, to take effect in possession AT OR WITHIN ONE YEAR NEXT AFTER THE MAKING THEREOF; Provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion (a); and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on nonpayment of the rent for a period of twenty-eight days AFTER IT

(a) See 3 Davidson's Precedents in Conveyancing, Part I., p. 500 n. (i).

BECOMES DUE, OR FOR SOME LESS PERIOD TO BE SPECIFIED IN THAT BEHALF; and provided a counterpart of every deed of lease be executed by the lessee.

This section is taken from sect. 32 of the Principal Act, with certain additions indicated by the small capitals, and with the omission of the words "thereby reserved and on non-observance of any of the covenants or conditions therein contained," after "non-payment of the rent." The words "any life or lives" were inserted in this section in place of the words "his life," on the motion of the Right Hon. Hugh Law, Q.C., ex-Attorney-General for Ireland, in committee on the bill in the House of Commons. Mr. Meldon was successful, on the report, in securing the insertion in this section, as in sect. 4, which see *supra* (by analogy to sect. 28 of the Landlord and Tenant (Ireland) Act, 1870), of the words "so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland." Mr. Law had given notice of a similar amendment in committee. The words "at or within one year next after the making thereof" were inserted, on the motion of Mr. Marten, Q.C., in committee on the bill. The words, "of twenty-eight days after it becomes due, or for some less period to be specified in that behalf," were contained in the bill as originally introduced. The words in sect. 32 of the Principal Act were, "not less than twenty-eight days of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein contained." The alteration was made to make the phraseology of this section correspond with that of sect. 4, sub-sect. (5).

The present section gives to the person making the demise a *very great power of management* of the settled estate. He may not only grant leases without anybody's consent, but he may impose such terms "as he shall think fit" on the lessees. A tenant for life, therefore, cannot grant leases under this section if *the management of the settled estate* is vested by the settlor, not in him, but in the trustees of the settlement. It is not sufficient that the Court should have the power to put the tenant for life "in possession," or to give him "the receipt of the rents and profits." He must be "*entitled to the possession,*" or "*entitled to the receipt of the rents and profits.*" Therefore,

where a testator, after devising two-fifths of certain real estate to trustees upon trust to receive the net rents and pay them to his widow for her separate use for life, devised his residuary real and personal estate to the same trustees, upon trust to receive the annual and other rents, interest, and income of such real and personal estate, and after defraying thereout all ground and landlord's rent (if any), and all taxes, charges, and expenses of insurance, repairs, collection, and other necessary outlay, to pay the net annual rents, interest, and income then left to his widow for her separate use for life, it was held by Sir George Jessel, M.R., that the widow was not such a "tenant for life" as this section contemplates, and that, consequently, she was not entitled to grant leases under it (b).

SECTION 47.

Against whom such leases shall be valid.

Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

This section is copied *verbatim* from sect. 33 of the Principal Act, with the addition of the words "the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against." These words are copied from sect. 8 of the Amending Act of 1858.

(b) *Taylor v. Taylor, Ex parte Taylor*, L. R., 20 Eq., 297; 44 L. J. (Ch.), 727; 33 L. T., 89; 23 W. R., 947. For a form of lease pursuant to s. 46, see Woodfall's Landlord and Tenant, 858 (11th ed., by Lely).

SECTION 48.

Evidence of execution of counterpart lease by lessee.

The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act.

This section is copied *verbatim* from sect. 34 of the Principal Act.

SECTION 49.

Provision as to infants, lunatics, &c.

All powers given by this Act, and all applications to the Court under this Act, and consents to and notifications respecting such applications, may be executed, made, or given by, AND ALL NOTICES UNDER THIS ACT MAY BE GIVEN TO, guardians on behalf of infants, and by OR TO committees on behalf of lunatics, and by OR TO trustees or assignees of the property of bankrupts, DEBTORS IN LIQUIDATION, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants in tail no application to the Court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the Court.

This section is taken from sect. 36(c) of the Principal Act (d), with the addition of the words printed in small capitals, which enlarge the scope of the section so as to include notices under the Act. As to these notices, see sect. 26, *supra*.

(c) The repealing sect. 35 of the Principal Act has been omitted from the present Act. See the 13 & 14 Vict. c. 21, s. 5, for the reason of this.

(d) See, on that section, the cases cited in Shelford's Real Property Acts, pp. 699, 700 (8th ed., by Carson), and compare Rules 21, 22 and 23, of the Regulations as to Business, 8th August, 1857, *ib.* 707, with the New Rules.

By the 5th of the new Orders, "Where it is desired that any guardian of an infant shall make or consent to any application to the Court under the Act, or make any notification respecting any application to the Court, or that notice may be given to any such guardian on behalf of an infant, the Court may appoint a guardian to such infant for the purposes of the Act, and an application for such appointment may, after the petition is presented, be made at chambers by the petitioner by summons. And if an infant is the petitioner, the petition may be presented by the infant by his next friend, and after the petition has been presented and answered, and a guardian appointed, the word 'guardian' shall be substituted in the petition for the words 'next friend,' and the name of the guardian (if the next friend and guardian shall not be the same person) for the name of the next friend."

By the 6th of the new Orders, "In the case of a lunatic or infant tenant in tail, by his committee or guardian, applying or consenting to an application, or giving a notification respecting an application, an application may be made at chambers by the petitioner after the petition is presented that such committee or guardian may be directed to so apply or consent, or give a notification, and in the case of an infant such application may be combined with the application to appoint a guardian."

By the 7th of the new Orders, "In cases where the committees or guardians of lunatic or infant tenants in tail shall be served with notice of the application in pursuance of the 26th section of the Act, an application may be made at chambers by the petitioner, before the expiration of the time specified in such notice, that such committees or guardians may notify that they either assent to or dissent from such application, or submit their rights or interests, so far as they may be affected by such application, to be dealt with by the Court."

By the 8th of the new Orders, "Upon an application to appoint a guardian to an infant for any such purpose as aforesaid, the summons shall be served upon the parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, of the infant, if there be any such parent or guardian, unless the Court or Judge shall dispense therewith."

By the 9th of the new Orders, "Upon any application that a committee or guardian of a lunatic or infant tenant in tail may be directed to make or consent to any application on behalf of such lunatic or infant, or to notify that the lunatic or infant assents to or dissents from such application, or submits his rights or interests so far as they are affected by such application to be dealt with by the Court, the summons shall be served on the committee of such lunatic, or the guardian appointed or proposed to be appointed of such infant, for such purpose."

By the 10th of the new Orders, "Upon an application to appoint a guardian of an infant the following facts shall be proved:—

"1. The age of the infant :

"2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, and, if so, whether such parent or guardian has any interest in the application, and if he has, the nature of such interest, and whether or not adverse to the interest of the infant :

"3. Where and under whose care the infant is residing, and at whose expense he is maintained :

"4. In what way the proposed guardian is connected with the infant, and why proposed and how qualified to be appointed :

"5. That the proposed guardian has no interest in the application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant :

"6. The consent of the guardian to act."

By the 12th of the new Orders, "Upon an application that a guardian of an infant tenant in tail may be directed to make or consent to any application, or to give any notification respecting any application, evidence is to be produced to satisfy the Judge that it is, and the guardian is to make an affidavit that he believes that it is, proper and consistent, with a due regard for the interests of such infant, that such direction shall be given."

By the 11th of the new Orders, "Upon an application that a committee of a lunatic tenant in tail may be directed to make

or consent to any application, or to give any notification respecting any application, the authority of the Judge or Judges intrusted with the care and commitment of the custody of the persons and estates of lunatics to such committee, to act on behalf of the lunatic, shall be produced, and if it shall appear thereby that such Judge or Judges are of opinion that it is proper and consistent, with a due regard for the interest of the lunatic, that the committee shall make or consent to the application, or give any specific notification respecting the application, such authority shall, unless the Court or Judge shall for any special reason require further evidence, be sufficient evidence upon which the Court or Judge may direct the committee to act in conformity with such authority."

These new Orders materially improve the practice.

It was the practice of the Court under the former Acts to appoint a guardian of the infant, although the infant had a father living or had a testamentary guardian or a guardian appointed by the Court, taking care that the person appointed had no interest adverse to the infant. It was considered that a father, if a tenant for life, was not a proper person to act as guardian to his infant tenant in remainder.

It has been assumed that this practice ought to be continued notwithstanding the case of *Re Marquis of Salisbury* (e), in which it was decided by the Court of Appeal that under another Act enabling guardians of infants to consent to the grant of lands, the father, as natural guardian of the infant, was the person to consent; but this decision creates some doubt whether under this Act, in case the infant has a father or other legal guardian, any other person can be appointed. It was also considered in that case that the Court had no jurisdiction to appoint a guardian; but under the Act to which that decision applied there were no proceedings in Court as under this Act.

The Act does not require the authority of the Judges having the care of lunatics, but it has been held (see *Re Woodcock's Trusts* (f)), that the committee must have the sanction of these Judges in addition to the direction of the Judge in Chancery, as required by the Act.

(e) 2 Ch. D., 39.

(f) L. R., 3 Ch., 229.

The 11th Order is framed so to render this double application as little expensive as possible.

As to service on persons of unsound mind, not so found by inquisition, see *Re Crabtree* (g), cited under sect. 26, *supra*.

As to dispensing with the examination and consent of a married woman, where a fresh petition is presented owing to a misdescription of the land, see *Re Earl of Kilmorey* (h).

SECTION 50.

A married woman applying to the Court, or consenting to be examined apart from her husband.

Where a married woman shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined apart from her husband touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement restraining anticipation shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

This section is copied *verbatim* from section 37 of the Principal Act (i).

An order can be made under this Act with regard to settled estates in which married women are interested, without the production of an affidavit of "no settlement" (j).

(g) L. R., 10 Ch., 201; 44 L. J. (Ch.), 261.

(h) 26 W. R., 54.

(i) See, on that section, the cases cited in Shelford's Real Property Acts, p. 700 (8th ed., by Carson).

(j) In *Re Standish's Settled Estates*, 25 W. R., 8. See the Consolidated Orders of the Court of Chancery, Order I.

SECTION 51.

Examination of married woman how to be made when residing within the jurisdiction of the Court, and how when residing without such jurisdiction.

The examination of such married woman WHEN RESIDENT WITHIN THE JURISDICTION OF THE COURT TO WHICH SUCH APPLICATION IS MADE, shall be made either by the Court or by some solicitor duly appointed by the Court for that purpose, who shall certify under his hand that he has examined her apart from her husband and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the Court to which such application is made, her examination may be made by any person appointed for that purpose by the Court, whether he is or is not a solicitor of the Court, AND SUCH PERSON SHALL CERTIFY UNDER HIS HAND TO THE EFFECT HEREINBEFORE PROVIDED IN RESPECT of the examination of a married woman resident within the jurisdiction. And the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the Court.

The first sentence of this section (with the addition at the commencement of the words "when resident within the jurisdiction of the Court to which such application is made") is taken from sect. 38 of the Principal Act (*k*). The second sentence is taken from sect. 6 of the Amending Act of 1858, modified so as to adapt its provisions to this Act.

The fact of the signatures of the married woman and of the Commissioner who examined her, appended to her separate

(*k*) See, on that section, the cases cited in Shelford's Real Property Acts, pp. 700, 701 (8th ed., by Carson).

examination, having been attested by the husband's solicitor, is no objection to the admission of the certificate. Per Hall, V.C. (7).

By Order 13 of the new Orders, "The examination of a married woman under sects. 50 and 51 of the Act may be taken at any time after the petition is presented and answered."

By Order 14 of the new Orders, "When it is desired that a married woman resident within the jurisdiction of the Court shall be examined otherwise than by the Court, a solicitor who is a perpetual commissioner to take acknowledgments of deeds by married women may be appointed for that purpose by the Judge at chambers in the Form No. 7 in the Appendix hereto, without summons or order, upon the request of the petitioner and a certificate of the solicitor for the petitioner in the Form No. 7 in the Appendix hereto that the person to be appointed is not a solicitor for the petitioner, or for any party whose concurrence or consent to the application is required; but where an examination by such solicitor will cause unreasonable expense, delay, or inconvenience, or where the married woman is resident out of the jurisdiction of the court, an application by summons may be made *ex parte* by the petitioner at chambers to appoint a solicitor, if such woman is resident within the jurisdiction of the Court, and if not so resident a person, whether a solicitor or not, to take such examination."

The 14th Order provides a short and inexpensive mode of obtaining the appointment of a solicitor when it is proposed that a perpetual commissioner to take acknowledgments of deeds by married women shall be appointed. These commissioners are obviously proper persons, and might with advantage have been authorized by the Act.

It would seem that the notice to be given pursuant to the 26th section of the Act may be served on a married woman, and if, upon being served, she notifies her assent, she would have to be examined under the 50th section, but if she notifies her dissent, or by a notification or by making no notification submits her rights and interests to be dealt with by the Court, no examination is required by the Act.

(7) *In Re Lewis's Settled Estates*, 24 W. R., 103; W. N., 1875, p. 190; 10 N. C., 153. But see *In Re Bendyshe*, 26 L. J. (Ch.), 814, per Kindersley, V.C.

The practice under these Orders will be that in every case the first proceeding will be to present a petition, and then all necessary notices, appointment of guardians to infants, examination of married women, and applications for directions to guardians and committees of infant and lunatic tenants in tail, can be made simultaneously before the petition comes on for hearing.

SECTION 52.

As to application by or consent of married women, whether of full age or under age.

Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

This section is copied *verbatim* from sect. 39 of the Principal Act.

In *Re Belt's Settlement* (m), the facts were as follows:—Mrs. Belt, who was tenant for life of a settled estate, which had been sold with the sanction of the Court, was childless, and, according to the medical evidence, past child-bearing (n). In default of issue the survivor of Mr. and Mrs. Belt would become absolutely entitled to the property under the trusts of the settlement. Vice-Chancellor Bacon, without saying that a deed acknowledged was absolutely necessary to enable Mr. and Mrs. Belt to dispose of the proceeds of the sale, thought that it would be “more satisfactory” that there should be such a deed (o). His lordship directed that, on the amendment of the petition,—which prayed for a transfer of the proceeds of the sale, discharged from the trusts of the settlement, into the joint names of Mr. and Mrs. Belt,—by stating the deed, adducing proof of its execution, the transfer should be made as prayed.

See, also, *Re Broadwood* (p).

(m) W. N., 1877, p. 201.

(n) She was 52 years of age.

(o) See *Mildmay v. Quick*, as reported in 11 N. C., 123.

(p) L. R., 7 Ch., 323.

SECTION 53.

No obligation to make or consent to application, &c.

Nothing in this Act shall be construed to create any obligation on any person to make or consent to any application to the Court or to exercise any power.

This section is copied *verbatim* from sect. 40 of the Principal Act.

SECTION 54.

Tenants for life, &c. to be deemed entitled notwithstanding incumbrances.

For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interest of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein.

This section is copied *verbatim* from sect. 41 of the Principal Act.

SECTION 55.

Exception as to entails created by Act of Parliament.

Provided always, that nothing in this Act shall authorize any sale or lease beyond the term of twenty-one years of any settled estates IN RESPECT OF WHICH, under the Act of the thirty-fourth and

thirty-fifth years of King Henry the Eighth, chapter twenty, "To embar feigned Recovery of Lands wherein the KING'S MAJESTY is in reversion," or under any other Act of Parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

This section is copied from sect. 42 of the Principal Act, the words "in respect of" being substituted for "in," and "King's Majesty" being substituted for "King" in the title to the 34 & 35 Hen. 8, c. 20. The latter amendment was made in the House of Lords with a view to bringing the title of that old Act into conformity with the Statute Roll (q).

SECTION 56.

Saving rights of lords of manors.

Nothing in this Act shall authorize the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

This section is copied *verbatim* from sect. 43 of the Principal Act. See sect. 9 of this Act, *supra*.

SECTION 57.

To what settlements this Act to extend.

THIS ACT SHALL, EXCEPT AS HEREINAFTER PROVIDED, APPLY TO ALL MATTERS EXISTING AT THE TIME OF THE PASSING OF THIS ACT, WHETHER PROCEEDINGS ARE ACTUALLY PENDING OR NOT, AND ANY

(q) See the Revised Edition of the Statutes, vol. i. p. 523.

PROCEEDINGS IN ANY SUCH MATTER MAY BE CONTINUED OR TAKEN UNDER THIS ACT AS IF THE MATTER ORIGINATED UNDER THIS ACT, OR MAY BE CONTINUED OR TAKEN UNDER THE ACTS HEREBY REPEALED, OR PARTLY UNDER THIS ACT AND PARTLY UNDER THE SAID REPEALED ACTS AS OCCASION MAY REQUIRE: PROVIDED ALWAYS, THAT the provisions IN THIS ACT CONTAINED RESPECTING demises to be made without application to the Court shall extend only to settlements made after THE FIRST DAY OF NOVEMBER ONE THOUSAND EIGHT HUNDRED AND FIFTY-SIX.

The corresponding section of the Principal Act (sect. 44) was as follows:—"The provisions of this Act shall extend to all settlements, whether made before or after it shall come in force, except those as to demises, to be made without application to the Court, which shall extend only to settlements made after this Act shall come in force." The Principal Act came in force on "the first day of November, 1856." It will be seen that the present section is, for the most part, new; the object of the new provisions being to adapt the Act to the "existing" business of the Court.

SECTION 58.

Repeal of Acts specified in Schedule.

THE ACTS SPECIFIED IN THE SCHEDULE TO THIS ACT ARE HEREBY REPEALED: PROVIDED ALWAYS, THAT THIS REPEAL SHALL NOT AFFECT ANYTHING DONE OR ANY PROCEEDING TAKEN UNDER ANY ENACTMENT HEREBY REPEALED.

This section is, of course, new. As it originally stood in the bill, it provided as follows:—"The Acts specified in the schedule to this Act are repealed to the extent in the third column in the schedule mentioned." The "extent" of repeal

specified in the third column of the schedule was, in each case, "the whole Act." The third column of the schedule was struck out, as unnecessary, in the House of Lords, and the words "to the extent in the third column in the schedule mentioned" disappeared with it.

In *Re Bolton* (q) Vice-Chancellor Hall held, that where a private Act passed in 1863 incorporated the Principal Act of 1856, this section did not repeal the portion of the private Act incorporating that Act. This section, he said, only repeals the Act of 1856 "in its character of a public Act."

SECTION 59.

Saving.

NOTHING IN THIS ACT SHALL INTERFERE WITH THE EXERCISE OF ANY POWERS TO AUTHORIZE OR GRANT LEASES CONFERRED BY ANY ACT OF PARLIAMENT NOT EXPRESSLY REPEALED BY THIS ACT.

This section is new. It was inserted on the report in the House of Commons, on the motion of Mr. Meldon. The object of inserting it was to "save" the provisions of sect. 28 of the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), which gives certain powers to a limited owner (r) to grant agricultural leases for the term of thirty-five years. See the notes to sects. 4 and 46 of the present Act, *supra*.

SECTION 60.

Extent of Act.

This Act shall not extend to Scotland.

This section is copied *verbatim* from sect. 45 of the Principal Act.

(q) W. N., 1878, p. 65.

(r) For the definition of this expression, see sect. 26 of the 33 & 34 Vict. c. 46.

SECTION 61.

Commencement of Act.

This Act shall commence on the first day of November one thousand eight hundred and SEVENTY-SEVEN.

This section is similar to sect. 46 of the Principal Act, with the substitution of "77" for "56."

The new Orders under the Act come into operation on the 7th of January, 1879 (Order 33).

SCHEDULE.

Session and Chapter.	Title or Short Title.
19 & 20 VICT. c. 120	AN ACT TO FACILITATE LEASES AND SALES OF SETTLED ES- TATES.
21 & 22 VICT. c. 77	AN ACT TO AMEND AND EXTEND THE SETTLED ESTATES ACT OF 1856.
27 & 28 VICT. c. 45	AN ACT TO FURTHER AMEND THE SETTLED ESTATES ACT OF 1856.
37 & 38 VICT. c. 33	THE LEASES AND SALES OF SETTLED ESTATES AMEND- MENT ACT, 1874.
39 & 40 VICT. c. 30	THE SETTLED ESTATES ACT, 1876.

This is the schedule referred to in sect. 58 of this Act, *supra*. The five Acts enumerated in the schedule are consolidated in an amended form into the present Act. Hence their repeal. See the note to sect. 58, *supra*.

I, the Right Honorable HUGH MACCAlMONT BARON CAIRNS, Lord High Chancellor of Great Britain, do hereby, in pursuance of the 42nd section of "The Settled Estates Act, 1877," appoint the Vice-Chancellor Sir Richard Malins, the Vice-Chancellor Sir James Bacon, the Vice-Chancellor Sir Charles Hall, and Mr. Justice Fry, to be the four Judges of the Supreme Court of Judicature, by whom, together with the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of Common Pleas, and the Lord Chief Baron of the Exchequer, Rules and Orders of Court, for carrying into effect the purposes of the said Act, shall be made as therein mentioned. And this appointment is to continue in force until the 31st day of December, 1879.

Dated this 19th day of July, 1878.

CAIRNS, C.

ORDERS

UNDER THE

SETTLED ESTATES ACT, 1877.

1. THE words "settlement," "settled estates," and "the Court" in these Orders shall have the same interpretation as in the Act.

The words "the Act" in these Orders shall mean the Settled Estates Act, 1877; "the petition" shall mean a petition under the Act, and "the Judge" shall mean the Judge of the Court with whose name the petition shall be marked, or to whom the petition shall be transferred.

2. All petitions, notices, affidavits and other proceedings under the Act shall be entitled "In the matter of the estates settled" [by the settlor or settlors, naming one of them and referring to the instrument by which the settlement shall have been created, and mentioning the parish or place and county in which the lands, messuages, or tenements proposed to be dealt with are situate], "and in the matter of the Settled Estates Act, 1877;" and every such petition shall be marked with the words "In the High Court of Justice, Chancery Division," and with the title of the Judge before whom it is intended to be heard (see Form No. 1 in the Appendix hereto). Upon the presentation of the petition, a day shall be appointed for hearing, not less (unless the Judge gives special leave) than eight clear days after such presentation, and in the computation of such eight clear days,

Sundays and other days on which the offices are closed shall not be reckoned; and every petition shall, in the body thereof, or in a schedule thereto, or by a plan thereto annexed, contain a detailed description of the property proposed to be dealt with by such petition sufficient to identify the same.

3. When a petition has been put into the paper for hearing, and by reason of the parties not being ready, or for any other cause, the Judge allows it to stand over generally, it may be put into the paper for a subsequent day, without any application to the Court or Judge, on the petitioner or his solicitor applying for that purpose to the secretary of the Lord Chancellor or Master of the Rolls (as the case may be); and notice of the appointment of such subsequent day shall be given by the petitioner, or his solicitor, two clear days before the day fixed, to the other parties entitled to appear on such petition.

4. The notice required to be given by the 26th section of the Act, if given before the hearing (or if given after the hearing, and the Judge shall not otherwise direct) may, without any other direction of the Court, be given within the jurisdiction of the Court, except in the case of a person of unsound mind, not so found by inquisition, by delivering to the person to be served a notice (in the Form No. 3 in the Appendix hereto), with such variations as circumstances may require, and the time to be specified in such notice for the person served to deliver or leave a notification shall—(a) in case the person to be served is a guardian of an infant, be such as shall be directed by the Judge in the order appointing the guardian, and in case the person to be served is a married woman, or a committee of a lunatic, not less than twenty-eight clear days after the service; (b) and in other cases not less than fourteen clear days after the service. In case the person to be served is of unsound mind not so found by inquisition, or

out of the jurisdiction of the Court, or it is desired to serve such notice on any person within the jurisdiction of the Court in any other manner than above provided, an application shall be made at chambers *ex parte* by the petitioner, for directions as to the manner in which such notice shall be given, and as to the time to be specified in such notice within which the notification is to be made by the person served.

5. Where it is desired that any guardian of an infant shall make or consent to any application to the Court under the Act, or make any notification respecting any application to the Court, or that notice may be given to any such guardian on behalf of an infant, the Court may appoint a guardian to such infant for the purposes of the Act, and an application for such appointment may, after the petition is presented, be made at chambers by the petitioner by summons. And if an infant is the petitioner, the petition may be presented by the infant by his next friend, and after the petition has been presented and answered, and a guardian appointed, the word "guardian" shall be substituted in the petition for the words "next friend," and the name of the guardian (if the next friend and guardian shall not be the same person) for the name of the next friend.

6. In the case of a lunatic or infant tenant in tail by his committee or guardian applying or consenting to an application, or giving a notification respecting an application, an application may be made at chambers by the petitioner, after the petition is presented, that such committee or guardian may be directed to so apply or consent, or give a notification, and in the case of an infant such application may be combined with the application to appoint a guardian.

7. In cases where the committees or guardians of lunatic or infant tenants in tail shall be served with

notice of the application, in pursuance of the 26th section of the Act, an application may be made at chambers by the petitioner, before the expiration of the time specified in such notice, that such committees or guardians may notify that they either assent to or dissent from such application, or submit their rights or interests, so far as they may be affected by such application, to be dealt with by the Court.

8. Upon an application to appoint a guardian to an infant for any such purpose as aforesaid, the summons shall be served upon the parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, of the infant, if there be any such parent or guardian, unless the Court or Judge shall dispense therewith.

9. Upon any application that a committee or guardian of a lunatic or infant tenant in tail may be directed to make or consent to any application on behalf of such lunatic or infant, or to notify that the lunatic or infant assents to or dissents from such application, or submits his rights or interests, so far as they are affected by such application, to be dealt with by the Court, the summons shall be served on the committee of such lunatic, or the guardian appointed or proposed to be appointed of such infant for such purpose.

10. Upon an application to appoint a guardian of an infant the following facts shall be proved :—

(1) The age of the infant :

(2) Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, and if so, whether such parent or guardian has any interest in the application, and, if he has,

the nature of such interest, and whether or not adverse to the interest of the infant :

- (3) Where and under whose care the infant is residing, and at whose expense he is maintained :
- (4) In what way the proposed guardian is connected with the infant, and why proposed, and how qualified to be appointed :
- (5) That the proposed guardian has no interest in the application, or, if he has, the nature of his interest, and that it is not adverse to the interest of the infant :
- (6) The consent of the guardian to act.

11. Upon an application that a committee of a lunatic tenant in tail may be directed to make or consent to an application, or to give any notification respecting any application, the authority of the judge or judges entrusted with the care and commitment of the custody of the persons and estates of lunatics to such committee to act on behalf of the lunatic shall be produced, and if it shall appear thereby that such judge or judges are of opinion that it is proper and consistent with a due regard for the interest of the lunatic that the committee shall make or consent to the application, or give any specific notification respecting the application, such authority shall, unless the Court or Judge shall for any special reason require further evidence, be sufficient evidence upon which the Court or Judge may direct the committee to act in conformity with such authority.

12. Upon an application that a guardian of an infant tenant in tail may be directed to make or consent to any application, or to give any notification respecting any application, evidence is to be produced to satisfy the judge that it is, and the guardian is to make an affidavit that he believes that it is, proper and consistent, with a due regard for the interest of such infant, that such direction shall be given.

13. The examination of a married woman, under sects. 50 and 51 of the Act, may be taken at any time after the petition is presented and answered.

14. When it is desired that a married woman, resident within the jurisdiction of the Court, shall be examined otherwise than by the Court, a solicitor, who is a perpetual commissioner to take acknowledgments of deeds by married women, may be appointed for that purpose by the Judge at chambers, in the Form No. 7 in the Appendix hereto, without summons or order, upon the request of the petitioner and a certificate of the solicitor for the petitioner, in the Form No. 7 in the Appendix hereto, that the person to be appointed is not a solicitor for the petitioner, or for any party whose concurrence or consent to the application is required; but where an examination by such solicitor will cause unreasonable expense, delay, or inconvenience, or where the married woman is resident out of the jurisdiction of the Court, an application by summons may be made *ex parte* by the petitioner, at chambers, to appoint a solicitor, if such woman is resident within the jurisdiction of the Court, and if not so resident a person, whether a solicitor or not, to take such examination.

15. Upon every petition the Court shall be satisfied, by sufficient evidence, that it is proper and consistent, with a due regard for the interests of all parties entitled under the settlement, that the powers should be exercised; and it shall be stated in the affidavit why, and upon what ground, it is deemed to be so.

16. Upon every petition where there are any trustees seized or possessed of an estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence is to be produced that notice of the application has been served on such trustees.

17. Upon every petition, evidence shall be produced to satisfy the Court that neither the applicant nor any party entitled has previously applied to either House of Parliament for a private Act to effect the same or a similar object, or if any such application has been made that the same was not rejected on its merits or reported against by the Judges to whom the Bill may have been referred.

18. If, upon the hearing of any petition, the Court shall be of opinion that notice ought to be served on any person who shall not have been served, or that notice of the application ought to be inserted in any newspaper, the Court shall give directions accordingly, and the petition shall stand over generally, or to such time as the Court shall direct.

19. When the Court shall at the hearing have directed notice of any application to be inserted in any newspapers, any person may, within the time specified in the notice, apply to the Court by motion, either *ex parte* or upon notice to the petitioner, for leave to be heard in opposition to or in support of the application; but if such motion shall be made *ex parte*, and the Court shall think fit to give such leave, it shall be subject to such order as the Court shall think fit to make as to costs.

20. Any such person having obtained leave under the last preceding order shall be at liberty, upon reasonable notice, to inspect and peruse the petition at the office of the solicitor for the petitioner, upon the payment of a fee of 13s. 4d. on each inspection, and shall be entitled (either without or after such inspection) to be furnished with a copy of such petition upon such application, terms, and conditions as are provided by Rules 8, 9, 12 and 13 of Order V. of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875.

21. Any order made on an *ex parte* motion giving leave to such person to be heard on any application shall be served on the solicitor for the petitioner.

22. Any person served with a notice, pursuant to the 26th section of the Act, requiring him to notify whether he assents to or dissents from the application, or submits his rights or interests, so far as they may be affected by such application, to be dealt with by the Court, and any trustee or other person served with notice pursuant to the 30th section of the Act, shall be at liberty, upon reasonable notice to the petitioner's solicitor, to inspect and peruse the petition without payment of any fee, and he shall be entitled to be furnished with a copy thereof upon such application, terms, and conditions as are provided by Rules 8, 9, 12 and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875.

23. In all cases in which land in a register county or district is affected by the exercise of any powers conferred on the Court by the Act, and the Court shall direct notice to be recorded pursuant to the 33rd section of the Act, such notice may be given by directing a memorial of the order to be registered. And in all cases in which the Court shall not think it practicable or expedient that notice under the said section should be recorded as therein mentioned, the order shall state that no record of the order need be made.

24. Every order shall state, in addition to the names of the petitioners, the names of the persons other than the petitioners who concur or consent, or to whom notice of the application has been given, or who (under Order 19) may have obtained leave to be heard in opposition to, or in support of, the application, and whether any notification was received from the persons to whom notice has been given,

and if any has been received, the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any and what rights, estate, or interest of any person whose concurrence or consent has been refused, or who shall not or shall not be deemed to have submitted his rights or interests to be dealt with by the Court, or whose rights or interests ought, in the opinion of the Court, to be excepted.

25. In cases where the Court authorizes a lease the order shall direct that the lease shall contain such conditions as are required by the Act, and such other covenants, conditions, and stipulations as the Court shall deem expedient with reference to the special circumstances, or may direct the same to contain such covenants, conditions, and stipulations as may be approved by the Judge at chambers, without directing the lease to be settled by the Judge.

26. The Rules 1, 2, 3 and 6 of Order LVII. (as to time) in the Schedule to the Supreme Court of Judicature Act, 1875, shall be applicable to these Orders, and to all proceedings under the Act.

27. The Forms set forth in the Appendix hereto shall be adhered to, subject only to such variations as may be necessary to meet the circumstances of the case or direction of the Court.

28. In all cases not provided for by the Act or these Orders, the existing Forms and mode of procedure and general practice of the Court on similar proceedings shall apply to proceedings under the Act.

29. The fees and allowances to solicitors of the Court, in respect of proceedings under the Act, shall be such as are provided by Order VI. of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875, and are applicable to such proceedings; and solicitors shall be entitled to charge and be allowed for a re-

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quest and certificate, under the 14th Order (of these Orders), and for attendances at the Judges' chambers to procure the appointment of an examiner thereon, a fee of 13s. 4d., if the lower scale of fees is applicable, and 1l. 1s. in other cases.

30. The fees to be taken by the officers of the Court, in respect to proceedings under the Act, shall be such as are provided by the orders under the Supreme Court of Judicature Act, 1875, dated 28th October, 1875, and are applicable to such proceedings; and every request, under the 14th Order (of these Orders), shall bear a stamp of 2s., if the lower scale of fees is applicable, and 3s. in other cases.

31. Every petition under the Act shall set forth the name, address, and description of the petitioner, and also a place within three miles from the site of Temple Bar, London, where he may be served with any order of the Court, or of the Judge in chambers, or notice relating to the subject of such petition.

32. The Judge in person sitting in Court or in chambers, in the case of any petition, may by special order dispense with all or any of the preceding Orders, so far as they are applicable to such petition, in any case in which he shall think fit, and upon such terms and conditions (if any) as he may deem proper.

33. These Orders shall come into operation on the 7th day of January, 1879, and shall apply to any petition presented on or after that date.

34. These Orders may be cited as "The Settled Estates Act Orders, 1878."

December, 1878.

CAIRNS, C.
G. JESSEL, M.R.
RICH'D. MALINS, V.C.
JAMES BACON, V.C.
CHARLES HALL, V.C.
EDWD. FRY, J.

APPENDIX

TO THE SETTLED ESTATES ACT ORDERS, 1878.*

—◆—

No. 1.—*Form of Title of Petition and other Proceedings.*

In the High Court of Justice,
Chancery Division.
The Master of the Rolls
[or the Vice-Chancellor Malins
or other Vice-Chancellor].

In the Matter of Estates settled by A. B. [or A. B. and
others] by will dated [or deed dated]
consisting of certain lands [or messuages or tene-
ments] in in the parish of in the
county of

And in the Matter of the Settled Estates Act, 1877.

—

No. 2.—*Form of Summons for directions as to service of Notice pursuant to the 26th section of the Act.*

(Title same as Petition.)

Let all parties concerned attend at my chambers at
on at o'clock on the hearing of an application on the
part of [the petitioners] that notice of the applica-

* By the 27th of the new Orders under the above Act, "The Forms set forth in the Appendix hereto shall be adhered to, subject only to such variations as may be necessary to meet the circumstances of the case or direction of the Court."

The Forms have been carefully prepared to carry out the Act and these Orders, and to elucidate the meaning of the Orders.

By the 28th of the new Orders, "In all cases not provided for by the Act, or" the new "Orders, the existing Forms and mode of procedure and general practice of the Court on similar proceedings shall apply to proceedings under" this "Act."

For Forms of Orders of the Court, see Pemberton on Judgments, pp. 617—632.

tion intended to be made by a petition presented in the above matters on the day of requiring A. B. and C. D. severally to notify whether he assents to or dissents from such application, or submits his rights and interests so far as they may be affected by such application to be dealt with by the Court, may be given by [state the manner in which it is proposed to give the notice, and the time within which the notification is to be required], or in such other manner as the Judge may think fit.

Dated this day of .

This summons was taken out by of , solicitors for the applicant.

No. 3.—*Form of Notice pursuant to section 26 of the Act.*

In the High Court of Justice,
Chancery Division.

The Master of the Rolls
[or the Vice-Chancellor Malins
or other Vice-Chancellor].

(Title same as Petition.)

Take notice that [name petitioners and their addresses as in petition] have presented a petition in the above matters praying that [as in petition, but describing the lands, messuages, or tenements as in the petition], and it is intended to apply to the said Court for an order in accordance with such prayer, and you are [severally] hereby required to notify in writing within after the service hereof, whether you assent to or dissent from such application, or submit your rights or interests so far as they may be affected by such application to be dealt with by the Court; such notification is to be delivered to the petitioner's solicitors, or left for them at the address specified at the foot hereof, and may be so delivered by transmitting the same to them by post at such address. If no notification shall be so delivered or left within the time above limited, you will be deemed to have submitted your rights and interests to be dealt with by the Court. In the event of your dissenting from such application, and desiring to be heard in opposition to the application, you are by your notification to require notice to be given to or left for you or your solicitor at a place to be specified within three miles from the site of Temple Bar, London, of the day on which the petition is fixed for hearing. You or your solicitor can, upon reasonable notice to the undersigned A. and B., inspect and peruse the petition

without payment of any fee, and you are entitled at your own expense to have a copy of such petition furnished to you..

Dated the day of .

A. and B.

[*Address within three miles of Temple Bar,
London.*]

Petitioner's solicitors.

To [*name the person or all persons to be served pursuant to the above section*].

NOTE.—A copy of the above notice, with a notification at the foot thereof to be filled up by you, is sent herewith.

No. 4.—*Form to accompany Notice pursuant to section 26 of the Act.*

(*Copy Notice.*)

In pursuance of a notice, of which the above is a copy, served on me on the day of I hereby notify that I*

Dated this day of .
To Messrs. .†

No. 5.—*Form of Summons for Appointment of a Guardian of an Infant, and for Leave for the Guardian to make or consent to an Application.*

(*Title same as Petition.*)

Let all parties concerned attend at my chambers at on at o'clock, on the hearing of an application on the part of [the petitioners].

That A. B., or some other proper person may be appointed guardian of C. D., an infant, and that E. F., or some other

* Here insert "assent to the application," or "dissent from the application," or "submit my rights and interests, so far as they may be affected by the application, to be dealt with by the Court."

And if you dissent and desire to be heard in opposition thereto, add "And I desire to be heard in opposition to the application, and require notice to be given to at [*naming a place within three miles of the site of Temple Bar, London*] of the day fixed for the hearing of the petition."

† Signature and address.

proper person may be appointed guardian of G. H., an infant, for the purpose of making on behalf of such infants (or consenting on behalf of such infants to) an application proposed to be made by a petition presented on the day of by the above-named applicants for an order in accordance with the prayer of such petition, and (in case the infants are tenants in tail) that such guardians may be directed to make (or consent to) such application.

Dated this

This summons was taken out by of solicitors for the applicants.

No. 6.—*Form of Summons for Appointment of a Guardian of an Infant to be served with Notice of an Application, and for Leave for the Guardian to deliver a Notification pursuant to such Notice.*

(Title same as Petition.)

Let all parties concerned attend at my chambers at on at o'clock, on the hearing of an application on the part of [the petitioners].

That A. B. or some other proper person may be appointed guardian of C. D., an infant, and that E. F., or some other proper person, may be appointed guardian of G. H., an infant, for the purpose of being served with a notice requiring them on behalf of such infants within clear days after service thereof, to notify whether they assent to or dissent from an application proposed to be made by a petition presented on the day of by the above-named applicants for an order in accordance with the prayer of such petition (or submit the infant's rights or interests, so far as they may be affected by such application, to be dealt with by the Court), and (in case the infants are tenants in tail) that such guardians may be directed to notify that they, on behalf of such infants, assent to (or dissent from) such application (or submit the infant's rights or interests, so far as they may be affected by such application, to be dealt with by the Court).

Dated this day of

This summons was taken out by of solicitors for the applicants.

No. 7.—*Form of Request to appoint a Person to examine a Married Woman.*

(Title same as Petition.)

The petitioners in a petition presented in these matters on the day of request that A. B., of, &c. [C. D.,

of, &c., and E. F., of, &c.*], being a solicitor [*or solicitors*], and a perpetual commissioner [*or perpetual commissioners*] to take the acknowledgment of deeds by married women, may be appointed for the purpose of any or either of them examining the petitioners G. the wife of H. I., and K. the wife of L. M., and N. the wife of O. P., of, &c., respectively, touching their knowledge of the nature and effect of the application intended to be made by the petition, and to ascertain whether they the said G. I. and K. M. respectively freely desire to make such application, and whether she the said N. P. freely desires to consent to such application.

We, the solicitors for the petitioners, hereby certify that neither of them, the said A. B., C. D., and E. F., is the solicitor for the petitioner or for any party whose concurrence or consent to the application is required.

Dated this day of .

A. and B.,
Solicitors for the petitioners.
Address.

The Master of the Rolls [*or the Vice-Chancellor*] appoints the said for the purposes mentioned in the above request.

E. F.,
Chief Clerk.

No. 8.—*Form of Summons to appoint Persons to examine Married Women.*

Let all parties concerned attend at my chambers, at on at o'clock, on the hearing of an application on the part of the petitioners in a petition presented in this matter on the day of that A. B., of &c., and C. D., of &c. [*and if the married women are within the jurisdiction, add being solicitors*], be appointed for the purpose of any or either of them examining the petitioners, G. the wife of H. I., and K. the wife of L. M., and N. the wife of O. P., of &c., respectively, touching their knowledge of the nature and effect of the application intended to be made by the said petition, and to ascertain whether they the said G. I. and K. M. freely desire to make such application, and whether she the said N. P. freely desires to consent to such application.

Dated this day of .

This summons was taken out by of solicitors for the applicant.

* Name such as may be required to examine all the married women who are to be examined.

No. 11.—*Form of Affidavit verifying Examination.*

(Title as in Petition.)

I, Q. R., of make oath and say that I was present and did see G. J., K. M. and N. P., respectively named in the above petition, sign the examination or paper writing annexed hereto and now produced and shown to me marked A., and that the signatures G. I., K. M., and N. P. attached thereto are respectively the proper handwritings of G. the wife of H. J., of , K. the wife of L. M., of , and N. the wife of O. P., of .

And I further say that I was present and did see A. B. sign the certificate or paper writing annexed hereto and now produced and shown to me marked B, and that the signature A. B. attached thereto is the proper handwriting of A. B., of &c. And I say that the signature Q. R. attached to the said paper writings as a witness is my handwriting.

No. 12.—*Form of Notice pursuant to the 30th section of the Act.*

(Title same as Petition.)

In the High Court of Justice,
Chancery Division.

Master of the Rolls
[or the Vice-Chancellor Malins
[or other Vice-Chancellor].

Take notice that [name petitioners and their addresses as in petition] have presented a petition in the above matters praying that [as in petition, but describing the lands, messuages, or tenements as in the petition], and it is intended to apply to the said Court for an order in accordance with such prayer. This Notice is given to you in pursuance of the above Act, because you are seised or possessed of an estate in trust for whose consent or concurrence to or in the application is required by the Act. You or your solicitors can, upon reasonable notice to the under-named A. and B., inspect and peruse the petition at the address specified at the foot hereof without payment of any fee, and you are entitled, at your expense, to have a copy of such petition furnished to you.

Dated this day of .

A. and B.,
Address,

Solicitors for the petitioners.

To [name the persons to be served pursuant to the above section].

No. 13.—*Form of Notice to be inserted in Newspapers,
if directed pursuant to the 31st section.*

(Title as in Petition.)

By direction of the Master of the Rolls [or the Vice Chancellor] notice is hereby given, that an application by petition has been made to the Court of the said Judge for a sale or for powers to grant leases of the above-mentioned hereditaments [or otherwise according to the circumstances], and the Court has directed the application to be adjourned [or adjourned till], and any person, whether interested in the estate or not, may on or before apply to the said Court by motion for leave to be heard in opposition to or in support of such application. The petition may be inspected on application to Messrs. A. and B., of the solicitors for the petitioners.

IX.

THE CONTINGENT REMAINDERS
ACT, 1877.

40 & 41 VICT. c. 33.

*An Act to amend the Law as to Contingent Re-
mainders.* [2nd August, 1877.]

A contingent remainder is defined by Mr. Fearné (*a*) to be "a remainder limited so as to depend on an event or condition, which may never happen or be performed till after the determination of the preceding estate," "for," he adds, "if the preceding estate (unless it be a mere trust estate) determine before such event or condition happens, the remainder will never take effect."

A shifting or springing use in a deed, and an executory devise in a will, are dependent on no prior estate. The estates created by them spring up with inherent force in the event specified in the instrument creating them, and displace for ever the then existing estates.

To assimilate perishable contingent remainders as far as possible to the indestructible shifting or springing use or executory devise has been, for some time past, a constant object of solicitude with the legislature; and rightly so, for

(*a*) Essay on Contingent Remainders and Executory Devises, 10th ed. p. 3.

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the settlor evidently intends in every case that the contingent remainder should be as certain of taking effect in the event specified by him as the shifting or springing use or executory devise.

A good illustration of the absurdity of making the contingent remainder entirely dependent upon the prior estate for its ever coming into existence, while the executory devise is allowed to spring up of its own inherent force, is afforded by the case of a devise by will to A. for life, with remainder in fee to such son of B. as shall first attain twenty-one.

Suppose A. dies in the lifetime of the testator, the limitation will be "to such son of B. as shall first attain twenty-one, in fee." The estate in fee, being undisposed of during B.'s minority, would descend, on the testator's death, to his heir at law. The moment B. attained twenty-one the estate in fee would pass away for ever from the heir to B. And why? Because the limitation is an *executory devise*. Suppose A. survives the testator, the limitation will be "to A. for life, with remainder in fee to such son of B. as shall first attain twenty-one." A. dies before any son of B. attains twenty-one. The remainder to such son of B. as shall first attain twenty-one perishes *eo instanti*. Why? Because it is a contingent remainder.

The present Act does away with this absurdity. The contingent remainder "to such son of B. as shall first attain twenty-one" "will take effect in all respects as if" it "had originally been created as an executory devise," i. e., as if no prior estate "to A. for life" had ever been interposed by the testator.

The legislature, prior to this enactment, had protected the contingent remainder to such son of B. as should first attain twenty-one from being destroyed by the "*forfeiture, surrender, or merger*" of the estate for life to B. This was accomplished by the statute 8 & 9 Vict. c. 106, s. 8: "A contingent remainder existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of this Act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of the preceding estate of freehold, in all respects as if such determina-

tion had not happened" (b). This enactment only protected the contingent remainder from destruction in the three cases specified, of the "forfeiture, surrender, or merger" of the preceding estate of freehold. The contingent remainder was still, until the present enactment, liable to fail, if, immediately on the death of the preceding tenant for life, A., it was not ready to come into possession,—all the sons of B. being minors.

Before the Bill on which this Act was founded was brought in, Mr. Joshua Williams, the eminent Real Property barrister, had printed and circulated a Bill, intituled "An Act for the Amendment of the Law with respect to Contingent Remainders." The material clauses of this Bill were as follows:

"3. A contingent remainder of an estate of freehold shall, if not otherwise invalid, take effect in possession, notwithstanding the want of a particular estate of freehold to support it, *in the same manner as it would have taken effect if it had been a contingent remainder of an EQUITABLE ESTATE* supported by an outstanding legal estate in fee simple. And, in like manner, a contingent remainder of a copyhold or customary estate shall, if not otherwise invalid, take effect in possession, notwithstanding the want of a particular copyhold or customary estate of freehold to support it.

"4. The legal estate in the meantime, and until such taking effect in possession as aforesaid, shall, if not otherwise disposed of, result to the settlor and his heirs, or customary heirs, as the case may be, as part of his old estate; or, if the contingent remainder be created by a will or codicil, to the heirs or customary heirs of the testator or other stock of descent, according to the rules of inheritance.

"5. The rules as to invalidity by reason of remoteness, which now govern contingent remainders of equitable estates, shall govern contingent remainders of legal estates, both freehold and copyhold or customary."

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of

(b) See Shelford's Real Property Acts, by Carson, 8th ed., pp. 639, 640.

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the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows.

The Bill upon which this Act is founded was introduced into the House of Lords by Lord Cairns, C., and read a first time on the 2nd of March, 1877. The Bill was read a second time on the 12th of March, 1877, after a short debate. The Lord Chancellor, in moving that the Bill be read a second time, said that the measure had been introduced to remedy an injustice in the operation of the existing law. As the law then stood, if a man left an estate to Brown for life, with remainder to the first son of John Smith who attained the age of twenty-one years, if Brown died before any son of John Smith attained twenty-one, the contingent remainder would be void. The Real Property Commissioners reported on that state of things in 1833 (c), and strongly recommended that the law should be altered. Since then an attempt had been made to revise the law and put it in a more satisfactory shape, but that attempt had not been successful. The object of the Bill, which was a very short one, was to limit the operation of the law. The necessity for this had been forcibly illustrated by a recent case, which showed that the present doctrine of law worked serious injustice in the devolution of family property (d).

In the case of *Cunliffe v. Brancker* (e), decided by Sir George Jessel, M.R., in March, 1876, affirmed on appeal, August, 1876, the limitations in the testator's will, dated 1814, were:—"Unto Richard Prescott and Thomas Addison, their heirs and assigns, to the use of the said Richard Prescott and Thomas Addison, their executors, administrators, and assigns, for the term of 120 years next after" the testator's "decease, if" the testator's "niece, Sarah Cunliffe, should so long live, upon trust during the said term to pay the clear yearly rents and profits of the

(c) 1832. Third Report of the Real Property Commissioners, pp. 23 and 68.

(d) Hansard's Parliamentary Debates, Vol. ccxxxii. (Third Series), p. 1736.

(e) 3 Ch. D., 393; 46 L. J. (Ch.), 128; 35 L. T., 578.

premises unto" the testator's "niece Sarah Cunliffe and her assigns for her separate use; and from and after the expiration, or sooner determination of the said term, to the use of the said *John Cunliffe during his life*, without impeachment of waste, with remainder to the use of the said Richard Prescott and Thomas Addison and their heirs during the life of the said John Cunliffe, *upon trust to preserve the contingent uses therein after limited from being defeated or destroyed*; and from and immediately after the decease of the said John Cunliffe, to the use of all and every or such one or more child or children of the said Sarah Cunliffe lawfully to be begotten *who should be living at HER decease*, as they the said John Cunliffe and Sarah his wife during their joint lives by any deed or instrument in writing, with or without power of revocation, to be by them executed" in manner therein mentioned, "should from time to time appoint; and in default of such joint appointment, then as *the survivor of them the said John Cunliffe and Sarah his wife* should by any deed or instrument in writing, with or without power of revocation, to be executed" in manner therein mentioned, "or by his *or her* last will or codicil appoint, give, or devise the same; and in default of such appointment, gift, or devise by the said John Cunliffe and Sarah his wife, or the survivor of them, to the use of all and every the child and children of the said Sarah Cunliffe lawfully to be begotten, *who should be living at the decease of the survivor of them the said John Cunliffe and Sarah his wife*, and the issue of such of them as should be *then* dead leaving lawful issue *then* living, such issue respectively to have and take, and if more than one equally amongst them, the part or share only of which his, her, or their parent or parents respectively would have taken and been entitled to, *if living at the decease of the survivor of the said John Cunliffe and Sarah his wife*, and the several and respective heirs and assigns of such child, children, and issue, for ever as tenants in common. And in case there should not be any child, or the issue of any child, of" the testator's "said niece, Sarah Cunliffe, *living at the decease of the survivor of them the said John Cunliffe and Sarah his wife*, then" over.

If John Cunliffe had survived Sarah his wife the contingent remainder would have taken effect, as there would have been

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John Cunliffe's particular estate of freehold to support it; but it happened, unfortunately, that John Cunliffe died in the lifetime of Sarah his wife, and her estate, and that of her trustees, being merely a chattel interest, the contingent remainder failed on the death of John Cunliffe.

Sir George Jessel, in so deciding, said: "This is a case in which, according to my view, the intention of the testator fails on account of a feudal rule of law, which, in my humble judgment, ought to have been abolished long ago. I mean the rule of law requiring that, in order to support a contingent remainder, there must be an estate of freehold in existence at the time the contingent remainder becomes vested, so that if at the time of the determination or cesser of the prior estates of freehold, the remainder has not vested, it fails, in spite of the intention of the settlor or testator. This always disappoints the intention, because every settlor or testator intends the contingent remainder to take effect. This is an arbitrary feudal rule, one of the legacies of the Middle Ages which has come down to our times, and which, not having been interfered with by the legislature, I cannot interfere with. How far judges may be, or ought to be, able to defeat a rule of law of which they disapprove I cannot say. I think it is the duty of a judge not to allow himself to be so influenced, but to arrive at the meaning of the instrument independently of the results. . . . I am compelled, by the artificial rule of law, to say that I must disappoint the testator's intention, by stating that the contingent remainders fail for want of a sufficient estate to support them."

In delivering judgment in the Court of Appeal, Lord Justice James said: "The rule of law was, and, strange to say, still is, that a contingent remainder fails unless there be a preceding freehold estate continuing to exist up to the happening of the contingency on which the remainder is to vest. That is the rule of law, and we cannot help it. We cannot alter the construction of the instrument to avoid or evade the rule. We must construe the words just as if there were no such rule of law, and then apply the rules of law to the instrument so construed. . . . So long as the legislature retains the rules of law as to particular estates and contingent remainders, we

are bound to act as if they were most reasonable and beneficial."

The Bill passed through Committee without amendment, on the 19th of March, and was read a third time on the 20th of April, and sent to the House of Commons.

The Bill was read a second time in the House of Commons on the 10th of July without debate.

The following curious discussion took place in the House of Commons in Committee on the Bill, on the 28th of July:—

"Mr. Parnell said: That, as no explanation had been given, he would oppose it on the preamble.

"The Chairman: There is no preamble.

"Mr. Parnell: Then I will move that you report progress.

"Motion made, and question proposed, 'That the Chairman do report progress, and ask leave to sit again.'

"The Attorney-General(e): There is only one clause, and as it has been on the table the greater part of the Session, I thought honorable members would know what it was. However, as the honorable gentleman wishes it, I will explain it to him. At present the law relating to contingent remainders is this: that they depend on the previous estate in possession, and if that previous estate is determined before they are ready to vest, the contingent remainders are destroyed altogether. Perhaps the honorable gentleman does not follow me. Let me put it in another way. If real property is settled, either by deed or will, on A. for life, with remainder over to B.'s children, and A. happens to die before B. has any children, the estate of these children fails altogether. The object of the present Bill is to preserve their estate.

"Mr. Biggar presumed that his honorable friend would now withdraw his motion to report progress. His honorable friend was right in making it; but the explanation just given by the Attorney-General showed that it was desirable to have an explanation of the object of all legal measures.

"Mr. Parnell (without rising from his seat): I beg to withdraw my motion.

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“The Chairman: It is usual for honorable members to rise to address the Chair.

“Mr. Parnell (rising): I apologize to the Committee; but I thought that, having spoken once, I had no right to address the Committee again.”

Motion, by leave, withdrawn. Bill reported without amendment (*f*). The Bill was read a third time in the House of Commons on the 30th of July, and received the Royal Assent on the 2nd of August.

SECTION 1.

Cases in which contingent remainders capable of taking effect.

Every contingent remainder created by any instrument executed after the passing of this Act (*g*), or by any will or codicil revived or republished by any will or codicil executed after that date (*h*), in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

It will be perceived that this section involves a considerable departure from the principles laid down in the Bill of Mr. Joshua Williams, Q.C. (already cited), by which a contingent remainder of a legal estate was proposed to be assimilated to a contingent remainder of an *equitable* estate.

Contingent remainders of trust or equitable estates are not

(*f*) Hansard's Parliamentary Debates, vol. cccxxvi. (Third Series), p. 132.

(*g*) The 2nd of August, 1877, which is also the date at which the Act came in force.

(*h*) It will be seen that the enactment is not retrospective.

governed by the same rules as contingent remainders of legal estates. They do not, like the latter, necessarily vest or fail upon the determination of the preceding estate, but await the happening of the contingency on which they are limited, subject, of course, to the rule against perpetuities (*h*).

The Real Property Commissioners, in their 3rd Report, said (*i*):—"It is a rule of law that a contingent remainder, limited to several individuals as a class, vests in those only who are in existence at the determination of the particular estate, to the exclusion of others who come into existence afterwards. Thus, where an estate was devised to J. H. for life, and after his decease to all the children of S. M., 'begotten or to be begotten,' it was held that it vested in five children, who were born in the lifetime of J. H.; and that four others, *who were born after his decease*, were excluded; although, in the same will, another estate devised to the children of S. M., in the very same words (but without any previous life estate), vested in all the nine children. The ground of the distinction was, that the latter gift took effect as an *executory devise*, which the former could not, because (as it was held) it might take effect as a contingent remainder; and the maxim of the law is that what may take effect as a contingent remainder shall never be an executory devise (*j*). . . . It must be presumed that in both the cases we have adverted to, the testator's bounty was meant to extend equally to all the objects; yet it depended upon a mere accident, and was the effect of a mere technical rule, that his intention was defeated in the former and took effect in the latter. This is a state in which we think the law ought not to be allowed to remain."

An illustration of the application of these technical rules occurred in 1876. A testator devised to his daughter N. an estate for life, and after her decease (omitting immaterial limitations), to the child or children of his daughter G., who, *either before or after her death*, should attain twenty-one, as tenants in common. At the death of N. two children of

(*h*) 1 Jarman on Wills, 237.

(*i*) Page 25.

(*j*) This maxim is, practically, inverted by the present enactment.

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G. had attained twenty-one. Other children of G. attained twenty-one subsequently to the death of N. It was held that the two children of G. who had attained twenty-one at N.'s death took to the exclusion of the others.

Vice-Chancellor Hall said: "It must be considered that the law is settled as to a gift of this kind, and every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise. The two children who had attained twenty-one at the death of the tenant for life took vested interests, and no authority for the proposition that there should be a divesting in order to let in subsequent takers has been referred to. I cannot apply the law applicable to executory devises to such a limitation as this. In Jarman on Wills (vol. i. p. 239), it is stated that those children who attain the age of twenty-one at the particular time take to the exclusion of all others who attain that age subsequently. As to whether this remnant of the feudal law ought to be altered or not by the legislature I say nothing. There were persons who thought that contingent remainders ought to be abolished; and when the first Act preserving contingent remainders from failure in certain cases was passed, some years ago, a clause was introduced giving effect to every gift by way of contingent remainder which would have had effect if it had been an executory devise, but the law was otherwise settled" (i).

Mr. Williams points out (k) that under his Bill the only children of G. who would have been excluded would have been those *unborn* at the death of N., and this in consequence of the rule against perpetuities. Mr. Williams, at the same time (l), contends that the new Act would have had no effect at all in preserving the estates of the children of G. who had not attained twenty-one at the death of N. An able reviewer in the *Solicitors' Journal* (m), "ventured to suggest a different construction" of the Act "from that which Mr. Williams seemed to adopt." This reviewer said, that if Mr. Williams' construction be correct, "the Act is a failure,

(i) *Brackenbury v. Gibbons*, 2 Ch. D., 417.

(k) *Williams on Seisin*, App. (B.), pp. 207, 208.

(l) *Ib.* p. 206.

(m) Of February 23rd, 1878.

for the inconvenience it was intended to remedy seldom arose except under gifts to *classes*. But as, in *Brackenbury v. Gibbons*, each child who attained majority during the existence of the particular estate was held thereupon to take a vested remainder in his share, and each child who was under age when the particular estate ceased was held to have only a *contingent remainder in a possible share which failed by the rules of tenure*, it might not be an unreasonable construction of the Act to hold that each share intended for a child who did not attain majority during the existence of the particular estate was a contingent remainder which did not vest during the continuance of the particular estate, and if the will had been executed after August 2, 1877, would have been saved by the Act. In the classification of limitations, a limitation by way of remainder to several persons described, not as individuals, but only by a common attribute, is conveniently distinguished from a limitation to individuals *nominatim* by being called a limitation in remainder to a class; but, as a class is not a person, and cannot take an estate, the limitation is in each case made up of distinct remainders to every person who in the event fulfils the contingent condition, separately liable to be defeated before the Act if that fulfilment does not happen while there is an estate to support the remainder."

This view was challenged in a letter addressed to the *Solicitors' Journal*(*n*) by Mr. Whately, who supported (*o*) the construction contended for by Mr. Williams. Mr. Whately's letter had the effect of eliciting a learned letter to the *Solicitors' Journal* from Mr. George Sweet, the eminent conveyancer, who said:—"The rule as to the vesting of legal remainders imports into every legal gift to a class by way of remainder the further condition (*p*) that the members of the class must be finally ascertained during the continuance or immediately upon the determination of the particular estate. When, by

(*n*) Of May 11th, 1878.

(*o*) See the *Solicitors' Journal* of June 22nd, 1878.

(*p*) "The limits of the class are first defined by the terms of the limitation itself, and are then further restricted by the operation of the rule."

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the Act of 1877, the rule as to the vesting of remainders was abolished in respect of remainders (limited by instruments executed after the passing of the Act) which might be valid as executory devises or future uses, the condition imported by that rule into such limitations was also abolished, and the time for ascertaining the class was made the same as it would be if these limitations were of a merely equitable estate. . . . Your reviewer's statement that a contingent limitation in remainder to a class as tenants in common is made up of a distinct remainder to every person who, in the event, fulfils the contingent condition, is strictly accurate, and the Act applies to each of those remainders which does not become vested during the continuance of the particular estate, whether or not there be a vesting during that time of any of the other shares. . . . To describe the successive vesting of each share in the member who ultimately becomes entitled to it, subject to the ascertainment of the amount of the share when it vests in possession, as the vesting in the member first *in esse* of the entire fee, which afterwards opens and takes in the others, is to substitute an obscure and inaccurate metaphor for a plain statement of a simple rule."

Mr. Joshua Williams replied to Mr. Sweet's letter. "I submit," he wrote (*p*), "that, in cases of this kind, the law is settled that when once a member of the class takes a vested interest, thenceforth there is no contingent remainder to any other member of the class; and, if so, there can be nothing on which the Act to amend the law as to contingent remainders can then operate." And again:—"In the case of a gift in remainder to unborn children as tenants in common in fee, the moment the first child is born there are no longer any contingent remainders. For a remainder waits for the determination of the particular estate, and cannot be limited on an estate in fee. But the estate which each younger child takes is derived out of, and *pro tanto* defeats, the estate in fee of the eldest and of each elder child. In former days this result was important. The interests of the younger children, being no longer contingent remainders, could not, after the birth of the

(*p*) In the *Solicitors' Journal* of June 1st, 1878.

eldest child, be destroyed by the surrender, forfeiture, or merger of the particular estate."

Mr. Sweet replied to Mr. Williams in a very animated letter. Analyzing Mr. Williams' authorities, he wrote:—

"Of the new doctrine which we are asked to adopt in order to justify the conceit that the first child takes at birth, not only what was intended for him, but also what was expressly given in the first instance to his brothers and sisters, I find no trace."

And again:—

"The subtlety invented by Mr. Williams, of a change of the condition of the limitations to the younger children from that of contingent remainders to some other condition for which no name has been found, effected by the birth of the eldest child, was never present to the mind of any person concerned in the argument."

When such giants in the conveyancing world as Mr. Joshua Williams and Mr. George Sweet differ as to the effect of the new Act upon contingent remainders to classes, the rest of the profession may well be content to wait until some case in which the point is involved arises and a Court of competent jurisdiction decides the question.

It is satisfactory to find that there is no difference of opinion between the eminent correspondents of the *Solicitors' Journal* as to the improvement effected by the new Act with regard to gifts to *individuals*, and also with regard to gifts to *classes*, where, *e. g.* none of the members of the class attain twenty-one in the lifetime of the tenant for life.

"Under the law," says Mr. Joshua Williams, "as it stood before the passing of the Act, if A. (the tenant for life) survived the testator, but died before any son of B. attained twenty-one, the limitation failed for want of any estate of freehold to support it. It was to remedy the hardships occasioned by the failure of such a limitation as this, when it occurred in the shape of a contingent remainder, that the Act was framed" (q).

"My conclusion," says Mr. Whately, "is, that if no chil-

(q) Williams on Real Property, 12th ed., p. 316.

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dren attain twenty-one in the lifetime of A., then the Act will apply, and all the children at any time attaining twenty-one will take as if the limitation to them had been originally by way of executory devise or shifting use."

It is important carefully to analyse the language of the present enactment. It only preserves a contingent remainder, "which would have been valid as a springing use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder." Suppose lands to be given to A. for life, and after his decease to such son of B. as shall first attain *twenty-four* years. A. dies before any son of B. attains twenty-four. The present enactment does not preserve the contingent remainder, because a gift, without any preceding estate of freehold, "to such son of B. as shall first attain twenty-four" is void for remoteness (q).

(q) See Williams on Real Property, 12th ed., pp. 271, 319.

X.

EXONERATION OF CHARGES.

40 & 41 VICT. c. 34.

An Act to amend the Acts seventeenth and eighteenth Victoria, chapter one hundred and thirteen, and thirtieth and thirty-first Victoria, chapter sixty-nine.
[2nd August, 1877.]

In accordance with the general rule, so firmly established in *The Duke of Ancaster v. Mayer* (a), that the personal estate of a deceased debtor is in equity the primary fund for payment of his debts, unless he has, by express words, or manifest intention, exempted it, it follows that the personal estate of a deceased mortgagor is the primary fund for payment of the mortgage debt, unless the mortgagor has, by express words, or manifest intention, exempted it (b). If the mortgaged estate descends the heir at law, if it is devised the devisee, is entitled to have it exonerated from the mortgage debt out of the personal estate of the intestate or testator.

The burden of proof lies (c) upon those who contend that the personal estate should be exonerated. "I take it to be certain," said Lord Eldon, in *Boote v. Blundell* (d), "that it is not enough for the testator to have charged his real estate with the payment of his debts; the rule of construction is one

(a) 1 Bro. C. C. 454; 1 White and Tudor's Leading Cases, 630.

(b) 1 White and Tudor's Leading Cases, 656; Shelford's Real Property Acts, 490.

(c) *Whieldon v. Spode*, 15 Beav., 537, 539.

(d) 1 Mer., 193, 220.

that aims at finding, not that the real estate is charged, but that the personal estate is discharged."

This state of the law being found unsatisfactory, the legislature passed, in 1854, the following "Act to amend the Law relating to the Administration of the Estates of deceased Persons" (*d*), better known as "Locke King's Act":—

"1. When any person shall, after the thirty-first day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention (*e*), the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person (*f*), but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person (*g*) claiming under or by virtue of any

(*d*) 17 & 18 Vict. c. 113. "The tendency of the decisions is to give as little effect as possible to the Act." Per Jessel, M.R., in *Gael v. Fenwick*, 22 W. R., 211; 43 L. J. (Ch.), 178; 29 L. T., 822.

(*e*) "'Contrary intention' means, of course, intention contrary to the heir or devisee paying the debt." Per Jessel, M.R., in *Gael v. Fenwick*, *ubi supra*.

(*f*) "I understand these words to mean 'other real estate not descended or devised to such heir or devisee.'" Per Jessel, M.R., in *Newmarch v. Storr*, 27 W. R., 104, 105; 39 L. T., 146.

(*g*) As an heir takes by descent he is not within this proviso. *Piper v. Piper*, 1 J. & H., 91; *Power v. Power*, 8 Ir. Ch. Rep., 340.

will, deed, or document already made or to be made before the first day of January, 1855.

"2. This Act shall not extend to Scotland."

Leaseholds for years are, by the language of the Act, which speaks of "the *heir* or *devisee* to whom such lands or *hereditaments* shall descend or be devised,"—words not applicable to leaseholds for years,—excluded from its operation. *Solomon v. Solomon* (h); *In re Wormsley, Wormsley v. Hill* (i).

With reference to the question what ought to be considered a "contrary or other intention" within the meaning of Locke King's Act, judges differed. Lord Westbury, C., in *Rolfe v. Perry* (j), arrived at the conclusion that it was inexpedient to lay down a general rule as to what was a sufficient signification by a testator of an intention to exclude the operation of the Act; in each case the intention must be gathered from the whole instrument.

A general direction that the debts, or that all the debts, of the testator should be paid out of the personal estate, was not such a "manifest intention" to discharge the personal estate as exonerated it, prior to Locke King's Act, from payment of the mortgage debts.

After Locke King's Act came in force, doubts arose as to whether a general direction that the debts, or that all the debts, of the testator should be paid out of the personal estate, was or was not a sufficient expression of an intention contrary to the rule established by Locke King's Act (k).

To remove these doubts, and otherwise amend Locke King's Act, the following statute (30 & 31 Vict. c. 69) was carried in 1867:—

"Whereas by an Act passed in the seventeenth and

(h) 33 L. J. (Ch.), 473; 10 L. T., 54; 12 W. R., 540; 10 Jur. (N. S.), 331; *Gael v. Fenwick*, *ubi supra*. "Probably by a slip of the draughtsman." Per Jessel, M.R., in the last cited case.

(i) 4 Ch. D., 665; 25 W. R., 141.

(j) 3 De Gex, J. & S., 481; 11 W. R., 674, 675; 32 L. J. (Ch.), 471; 8 L. T., 441.

(k) See *Eno v. Tatham*, 3 De Gex, J. & S., 443; 11 W. R., 475; 8 L. T., 127; 3 L. J. (Ch.), 311; and *Rowson v. Harrison*, 31 Beav., 207. See, also, *Newmarch v. Storr*, 27 W. R., 104, 105; 39 L. T., 146.

eighteenth year of her present Majesty it is enacted, among other things, when any person shall, after the thirty-first of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof; according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof :

“ And whereas doubts (*l*) may exist upon the construction of the said Act, and it is expedient that such doubts should for the future be removed :

“ Be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows :

“ 1. In the construction of the will of any person who may die after the thirty-first day of December, 1867, a general direction (*m*) that the debts, or that all the debts, of the testator shall be paid out of his personal estate, shall not be deemed a declaration of an intention contrary to or other than

(*l*) The “ doubts ” were those created by the decisions of the Courts, the tendency of which decisions was to give as little effect as possible to Locke King's Act. Per Jessel, M.R., in *Gael v. Fenwick*, 22 W. R., 211.

(*m*) Nothing short of a “ specific direction ” will do. Per Cairns, C., in moving the Second Reading of Bill of 1877; Hansard's Parliamentary Debates, vol. cccxxii. (Third Series), p. 1735.

the rule established by the said Act, unless ⁽ⁿ⁾ such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

"2. In the construction of the said Act and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator.

"3. This Act shall not extend to Scotland."

In the case of *Hood v. Hood* ^(o) it was held that a vendor's lien for unpaid purchase-money was not a "charge by way of mortgage" within the meaning of the 17 & 18 Vict. c. 113. Hence the personal estate of the deceased purchaser remained under that Act primarily liable for its payment.

The second section of the Amending Act of 1867 extended the word "mortgage" to "any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator." In *Harding v. Harding* ^(p) Vice-Chancellor Bacon held that the language of this section was express, and that the heir at law was entitled to have lands purchased by an intestate exonerated by the personal representative from vendor's lien in respect of unpaid purchase money. This "*casus omissus*," as the Vice-Chancellor termed it, has been met by the new Act.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in

⁽ⁿ⁾ The meaning of this proviso appears to be that if a testator wishes to give a direction which shall be deemed a direction contrary to the rule laid down in the principal Act, it must be a direction applying to his mortgage debts in such terms as *distinctly and unmistakeably* to refer to or describe them. Per Sir G. M. Giffard, V. C., in *Nelson v. Page*, 7 L. R., Eq., 25.

^(o) 5 W. R., 747; 3 Jur. (N. S.), 684; *Barnewell v. Irmonger*, 1 Dr. & Sm., 242, 255, 259.

^(p) L. R., 13 Eq., 493.

this present parliament assembled, and by the authority of the same, as follows :

It was deemed expedient still further to amend the law relating to the exoneration of personal estate from mortgage debts and other charges. Hence the present Act. The bill upon which it is founded was presented to the House of Lords on the 1st of March, 1877, by Lord Cairns, C. It was read a second time in that house on the 12th of March, 1877, on the motion of the Lord Chancellor, who said that the Principal Act and the Amending Act of 1867 extended to freehold property only; and as, in some recent instances (*q*), the same injustice had arisen in respect of leasehold property, the object of the present bill was to extend the former Acts to leaseholds (*r*). It will be seen that this is one of the objects, but not the only object, of the Act. The bill passed through committee in the House of Lords on the 19th of April, and on the 20th of April it was read a third time and sent down to the Commons. The bill was introduced into the House of Commons by Sir John Holker, A. G., on the 30th of April, 1877. It was read a second time in the House of Commons, without any discussion, on the 10th of July, 1877. On the 28th of July the bill went into committee in the House of Commons.

The Attorney-General, in committee on the bill in the Commons, made the following explanation of its provisions:—"The object of the bill is to alter the present law, so that when property devised is subject to certain charges, or comes to a person under an intestacy, and is subject to charges, the person taking the property shall be liable to the charges, instead of having them paid out of the personal estate" (*s*).

The bill was read a third time in the House of Commons on the 30th of July. It received the royal assent on the 2nd of August.

(*q*) See *Solomon v. Solomon*, 33 L. J. (Ch.), 473; 12 W. R., 540; 10 Jur. (N. S.), 331; *In re Wormsley's Estate*, *Hill v. Wormsley*, 4 Ch. D., 665; 25 W. R., 141; *Gael v. Fenwick*, 22 W. R., 211.

(*r*) Hansard's Parliamentary Debates, vol. cccxxii. (Third Series), pp. 1735, 1736.

(*s*) Hansard's Parliamentary Debates, vol. cccxxvi. (Third Series), p. 133.

SECTION 1.

Application of Acts in Schedule.

The Acts mentioned in the schedule hereto shall, as to any testator or intestate dying after the thirty-first December, 1877 (*t*), be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate.

"The Acts mentioned in the schedule hereto"—i.e., the Principal Act, 17 & 18 Vict. c. 113, and the Amending Act of 1867, 30 & 31 Vict. c. 69. See the schedule, *infra*.

"Or intestate." "Including any lien for unpaid purchase-money." These words were introduced in order to remedy the decision in *Harding v. Harding* (*u*). The word "mortgage" in the Principal Act, and the Amending Act of 1867, will now extend to vendor's lien for unpaid purchase-money upon any lands purchased by an *intestate*.

"Or possessed of or entitled to." "Lands of whatever tenure." These expressions were introduced into the new Act in order to remedy the decisions in *Solomon v. Solomon* (*x*),

(*t*) It will be seen that the Act is not retrospective.

(*u*) L. R., 13 Eq., 493.

(*x*) 33 L. J. (Ch.), 473; 12 W. R., 540; 10 Jur. (N.S.), 331.

and *Re Wormsley, Hill v. Wormsley* (u). Leaseholds will now no longer be excluded from the operation of the Principal Act.

"A contrary intention." See the Amending Act of 1867 (30 & 31 Vict. c. 69), cited *supra*.

"Such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate." The object of this provision appears to be to alter the law as settled by the decision of Vice-Chancellor Malins in *Maxwell v. Hyslop* (x), affirmed on appeal by the House of Lords (y). In that case the testator, a Scotchman domiciled in England, gave his residuary personal and real estate to trustees upon trust to sell, and "out of the moneys which" should "come to their hands by virtue of the aforesaid residuary devise and bequest to pay and discharge all" his "just debts, funeral and testamentary expenses, and the legacies bequeathed by" his "will." The testator executed in Scotland subsequently a heritable bond and disposition, by which he charged an estate with a sum of 14,143*l*.

It was held by Vice-Chancellor Malins, and his decision was affirmed on appeal, that the debt of 14,143*l*. was payable out of the testator's residuary personal and real estate, in exoneration of the estate charged with the debt. The ground of this decision appears to have been that the testator had given directions for the payment of his debts out of a *particular* fund, viz. the residuary estate (z), and that this took the case out of the Act of 1867, which only applies to "a *general* direction that the debts, or that all the debts, of the testator shall be paid out of his personal estate" (a).

In *Lewis v. Lewis*, however, where the testator had devised and bequeathed all the residue of his estate and effects whatsoever and wheresoever situate to trustees upon trust, *after payment* thereof of all his just debts, funeral and testamentary

(u) 4 Ch. D., 665; 25 W. R., 141.

(x) L. R., 4 Eq., 407.

(y) 4 H. L., 506; *nomine Maxwell v. Maxwell*.

(z) See *Lord Brooke v. The Earl of Warwick*, 1 H. & T., 142.

(a) See per Counsel, arg. in *Lewis v. Lewis*, L. R., 13 Eq., 218, 223, 224.

expenses, for his son, J. Lewis, and devised the proceeds of an estate, subsequently mortgaged for 1,950*l.* by the testator, to A. Lewis, Vice-Chancellor Malins held that the residuary gift, subject to payment of debts, was not a sufficient expression of a "contrary intention" to exonerate the mortgaged estate from paying the mortgage debt.

The present section clears up any doubt on the matter, and practically reverses the rule as laid down in *Maxwell v. Hyslop* and *Maxwell v. Maxwell*.

The words "or residuary real and personal estate or residuary real estate" may now be read as incorporated in s. 1 of the Amending Act of 1867 after the words "personal estate" as to any testator or intestate dying after the 31st December, 1877.

SECTION 2.

Act not to extend to Scotland.

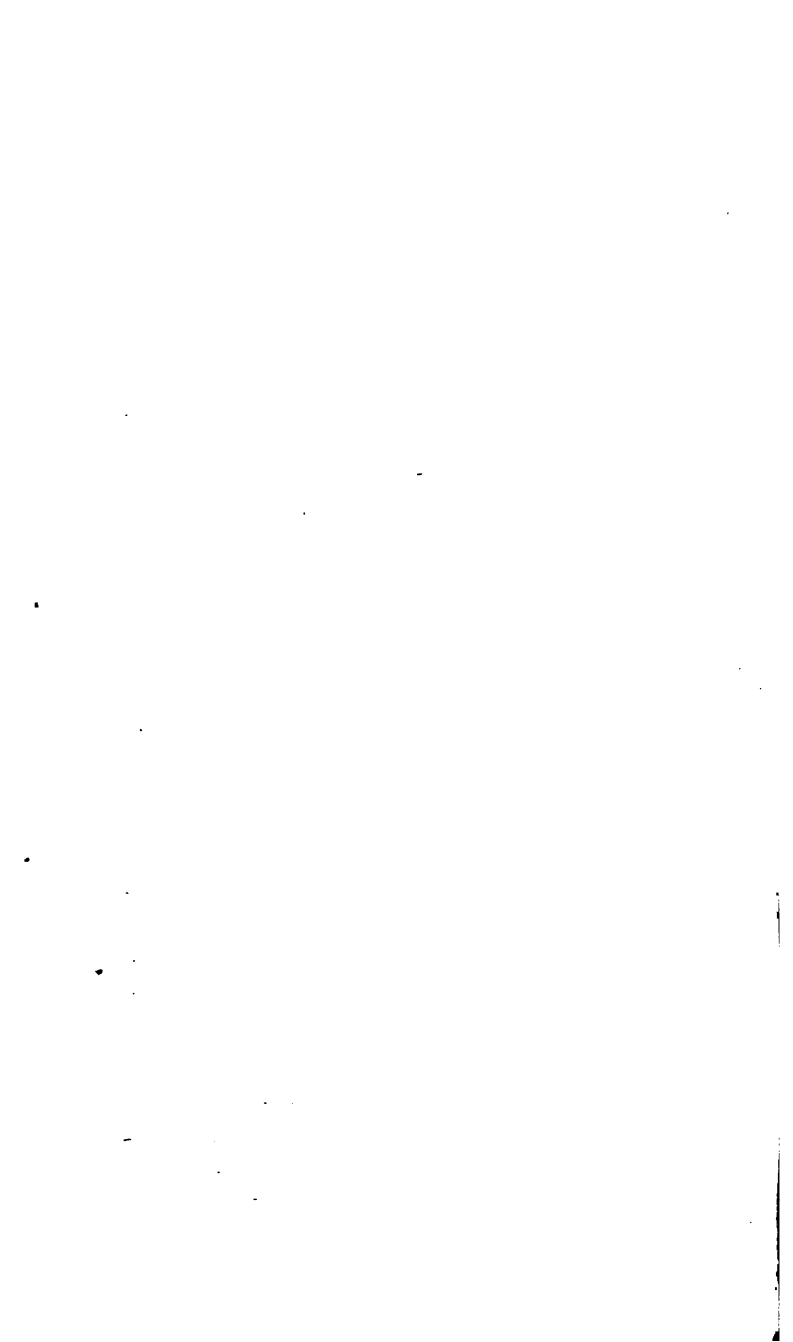
This Act shall not extend to Scotland.

The Principal Act and the Amending Act of 1867 were similarly confined in their operation to England and Ireland.

SCHEDULE.

17 & 18 Vict. c. 113	An Act to Amend the law relating to the administration of the estates of deceased persons.
30 & 31 Vict. c. 69..	An Act to explain the operation of the Act 17 & 18 Vict. c. 113.

This is the schedule referred to in section 1, *supra*.



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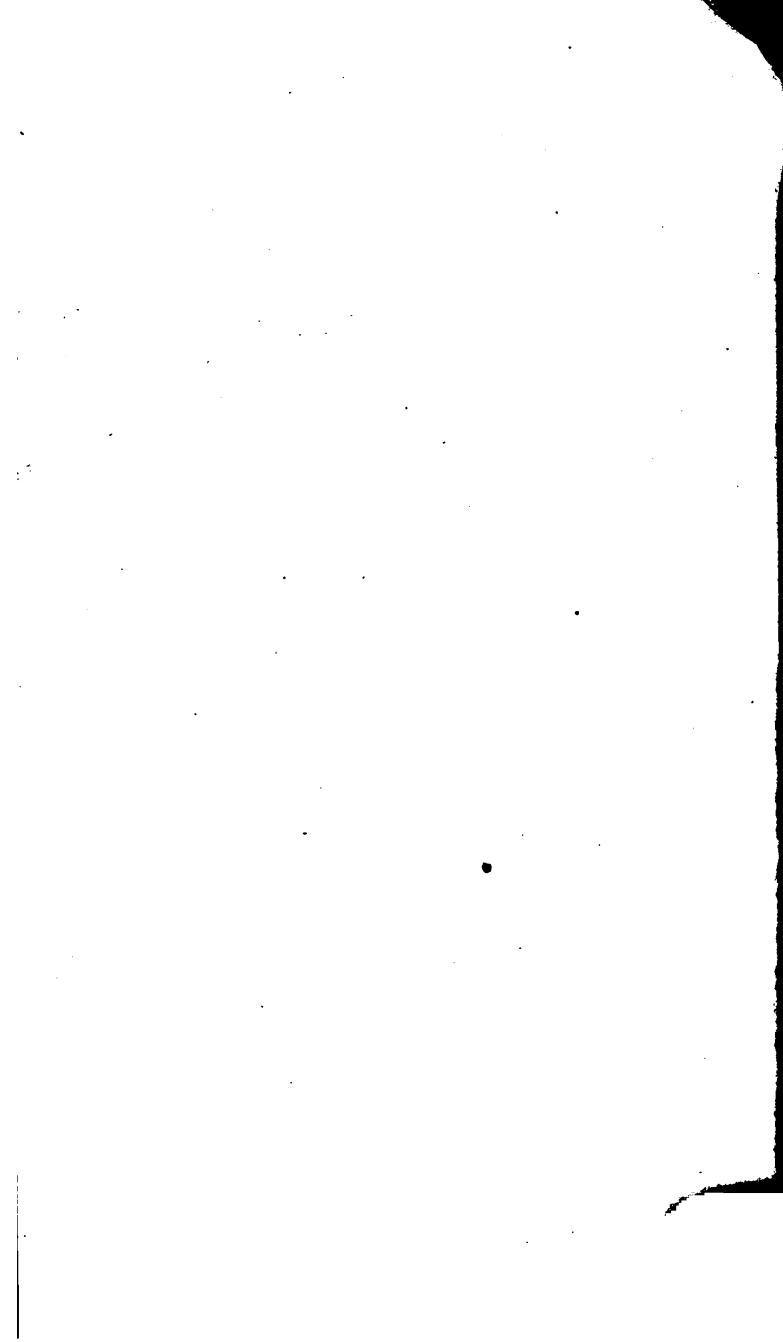
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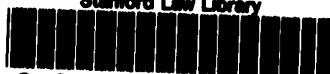


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